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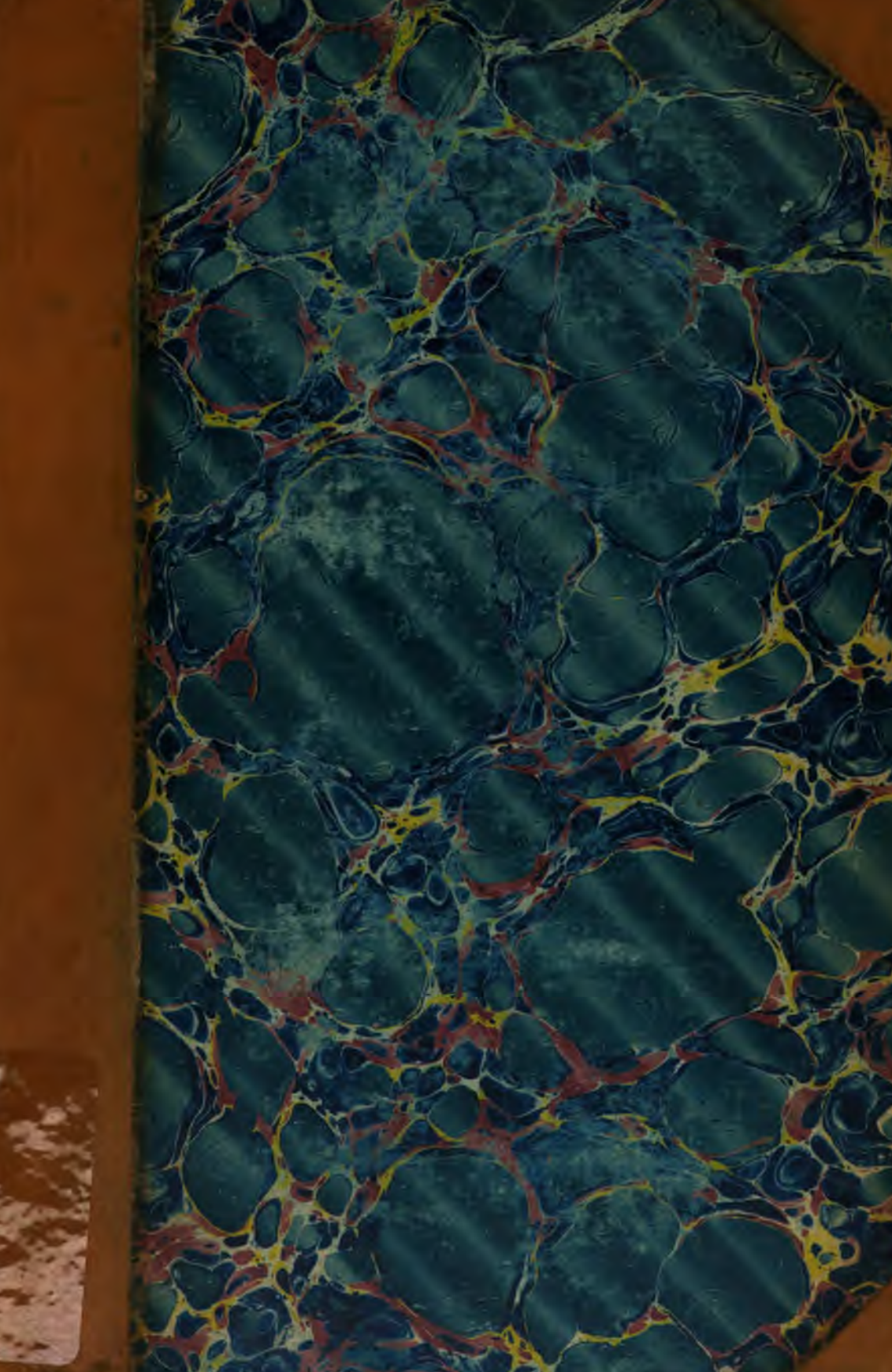
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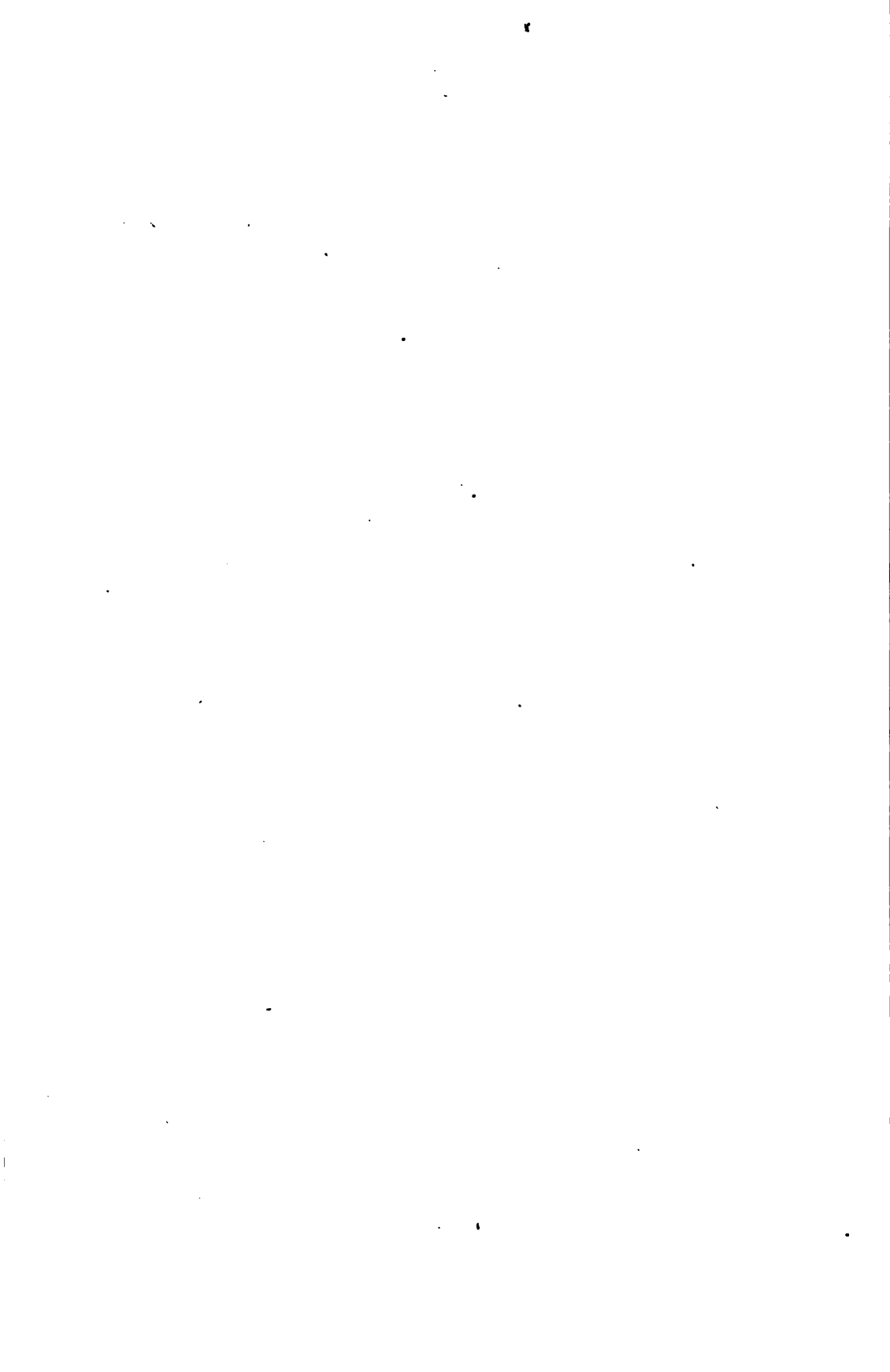


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## DIARY FOR JANUARY.

1. Thurs. *Circumcision*. Master and Registrar in Chancery and Clerks and Dep. Clerks of Crown so make returns. Taxes computed from this date.
5. Mon. Error and Appeal sit. beg. Heir and dev. sit. beg. Co. Ct. Term beg. Municipal elections.
6. Tues. *Epip.* Xmas Vac. in Chy. ends. Co. of York Winter Assizes begin.
9. Fri. Napoleon III. died at Chiselhurst, 1873.
10. Sat. Co. Ct. T. ends. Master and Reg. in Chy. and Clks. and Dep. Clks. to pay over fees to Prov. Treas.
11. SUN. 1st Sunday after Epiphany.
15. Thurs. Hamilton Winter Assizes beg. Regs. to make ret. to Co. Treas. under 35 Vic. c. 27, s. 7. Treas. to make ret. to Prov. Treas. under Mun. Act s. 273.
17. Sat. Candidates for Atty. to leave articles with Sec. of Law Soc. (35 Vic. c. 21, s. 5.)
18. SUN. 2nd Sunday after Epiphany. Lord Lytton died, 1873.
19. Mon. 1st Meet. of Mun. Coun. (Exc. Co. Coun.)
20. Tues. Heir and Dev. Sita. end. Prim. ex. of Stud.-at-Law and Art. Clks.
21. Wed. Ann. Meet. Electoral Div. Soc. (35 V. c. 32, s. 3.)
23. Fri. S.S. *Northfleet* run down and sunk, 1873.
25. SUN. St. Paul. 3rd Sunday after Epiphany.
26. Mon. Law School Examinations.
27. Tues. Intermediate Examinations (written). 1st Meet. of Co. Councils.
28. Wed. Intermediate Examinations (oral).
29. Thurs. Exam. for admis. as Atty. Cand. for call to pay fees and leave papers.
30. Fri. Exam. for call to Mr. Last day for Non-Res. to notify Clk. of Mun. (32 Vic. c. 36, s. 6.)
31. Sat. Co. Treas. to furnish Co. Clks. list of lands 3 yrs. in arre. for taxes. Ry. Co.'s to make ret. of lands in each Mun. (32 V. c. 36, s. 33.) Mun. Clk. to make up N. R. list (do. s. 6.) Co. and City Clks. to make yearly ret. to Prov. Sec. (36 V. c. 48.) Coun. to make ret. of debts to Lieut.-Gov. under Mun. Act, s. 274. Exam. for call with honours.

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## LAW SOCIETY OF UPPER CANADA .....

## THE

## Canada Law Journal.

Toronto, January, 1874.

A court for the disposal of matrimonial causes has been lately opened in Sydney, New South Wales. The first sitting was a "maiden" one, and a pair of white gloves was presented to the presiding judge.

The judges in England have held a meeting and come to the conclusion that proceedings in Chambers are not to be reported, and it is now understood that the representatives of the Press are to be excluded from the Chambers of all the Courts of Common Law.

Printers seem to have an insuperable objection to giving proper credit to contemporaries for articles republished from their pages. We gave our readers, last month, the benefit of a very learned article on *Dumpror's Case*, taken from the *American Law Review*, but the name of that very valuable magazine did not appear. We may properly take this occasion to draw attention to this Review, which is one of the best conducted legal periodicals either in England or America.

The President of the United States has nominated the Hon. George H. Williams, at present Attorney General, for the high office of Chief Justice of the Supreme Court. It was thought that this nomination would have been confirmed by the Senate, but there are rumours affecting his personal integrity which, if well founded, may prevent his appointment. Mr. Williams is a little over 50 years of age; commenced official life as Circuit Judge in Iowa; was afterwards Chief Justice of the Supreme Court of the Territory of Oregon; served six years in the United

## EDITORIAL ITEMS.

States Senate, and has been for the last two years Attorney General. He has a high, though not the highest reputation, at the bar.

The English Solicitors are moving to secure an amendment of the law in a matter so obviously demanding amendment as to render it somewhat astonishing that the desired result has not long ago been achieved in England and in Canada. The various law societies there are about forming a scale of charges for payment of conveyancing work by commission on the value of the property in question, with a view to secure its general adoption and its ultimate sanction by statute. The profession in Ontario should unite to secure a similar result, and should not cease from their exertions till unlicensed practitioners are prohibited from drawing instruments relating to the transfer of lands. This would be a boon not only to the profession, but to the public. It is a matter of frequent remark from the bench that many expensive law-suits have originated in the blunders of rustic conveyancers, whose knowledge of legal drafting has come to them by nature. If that man be a fool who has himself for a client, certainly he does not much mend his folly by taking his lay-neighbour as his solicitor. It is now full time that the profession should assert its rights and protect the public from themselves in this matter of irresponsible conveyancing.

We trust we shall not shock the sense of propriety of members of the profession by devoting some space in our columns to the lighter and more entertaining part of legal literature. We shall occasionally mingle with the purely legal what has been called the "literary legal;" in other words that which aims at entertaining more than instructing, in the belief that the dignity of the law does not necessarily mean dullness of the law. In this de-

partment we promise that the same severe meditation and conscientious labour will be employed as is spent upon our profoundest articles, and we hope that the severest criticism will see nothing to offend a refined taste, or to wound the feelings of the most susceptible.

We dare to say that, although dryness is supposed to be the special attribute of law, in no association of men is there more wit and humour displayed than in the courts of law. The *jeux d'esprit* of the bench and bar in other countries are carefully recorded, and a most interesting and characteristic collection of witty sayings is thus preserved. Is our legal community deficient in a sense of humour? Are "good things," which are worth preserving, never said in our courts? On the contrary, we confidently affirm that in our own courts the tedium of a trial or argument is constantly enlivened by some *bon mot* or playful sally, from bench or bar, which is worthy of record—the brilliant wit and clever repartee of at least one distinguished present member of the bench (not to speak of many of those who have heretofore meted out justice in Osgoode Hall) has seldom been excelled by the most ready of his brethren in Great Britain. Thinking then, with Sterne, "that every time a man smiles—but much more so when he laughs—it adds something to this fragment of life," we invite our friends to note carefully everything that bears a semblance to a joke in relation to legal matters, and send it to us. It will be received with thanks, and if we recognize therein anything valuable in the line of humour, we shall give it to the world, and we feel sure that the world will be none the worse for reading it.

The following observations of President Grant in his recent message touching the repeal of the bankrupt laws are worthy of being placed on record in our pages, at this juncture, having regard to the agita-

## SUGGESTIONS FOR THE AMENDMENT OF THE LAW.

tion during a former session of the Dominion House for a repeal of the Insolvent Act. He says and recommends as follows :

"I have become impressed with the belief that the act approved March 2, 1867, entitled an "Act to establish a uniform system of bankruptcy throughout the United States," is productive of more evil than good. At this time, many considerations might be urged for its repeal, but, if this is not considered advisable, I think it will not be seriously questioned that those portions of said act providing for what is called "involuntary bankruptcy" operate to increase the financial embarrassment of careful and prudent men, who very often become involved in debt in the transaction of their business, and though they may possess ample property, if it could be made available for that purpose, to meet all their liabilities, yet, on account of the extraordinary scarcity of money, they may be unable to meet all their pecuniary obligations as they become due, in consequence of which they are liable to be prostrated in their business by proceedings in bankruptcy at the instance of unrelenting creditors. People are now so easily alarmed as to money matters, that the mere filing of a petition in bankruptcy by an unfriendly creditor will necessarily embarrass and oftentimes accomplish the financial ruin of a responsible business man. Those who otherwise might make lawful and just arrangements to relieve themselves from difficulties produced by the present stringency in money are prevented by their constant exposure to attack and disappointment by proceedings against them in bankruptcy; and, besides, the law is made use of in many cases by obdurate creditors to frighten or force debtors into a compliance with their wishes, and into acts of injustice to other creditors and to themselves. I recommend that so much of said act provides for involuntary bankruptcy on account of the suspension of payment be repealed."

#### JUDICIAL AND OTHER SUGGESTIONS FOR THE AMENDMENT OF THE LAW.

I. Where the father of children who had been abducted filed a bill for the purpose, among other things, of ascertaining the place to which they had been removed, and was baffled in his examination of the defendants before a special ex-

aminer, by the objection that the answer would tend to render them liable to a criminal prosecution: Spragge, C., in his judgment observed: "I cannot help expressing my strong conviction that the law is not upon a sound footing in this respect; and that it would be in furtherance of justice that the rule with us should be the same as it has been made by statute in some cases in England, that parties and witnesses should be compellable to answer, but that their answers should not be admissible on evidence in any criminal proceedings that might thereafter be instituted against them:" *Keith v. Lynch*, 19 Gr. 505.

II. "The conduct of insurance companies, when enforcing rigidly such conditions, has often been complained of by the courts—by reason of the number and nature, and difficulty of the conditions they introduce into their policies; and the time perhaps has come when the Legislature should interfere to stand between them and those they insure, or pretend to insure, in other words, the public, by limiting them to such conditions as the courts shall determine to be reasonable."

"The only way to force upon companies a proper mode of doing business is by the Legislature enabling the courts to prohibit and restrict such conditions." Per *Wilson, J.*, in *Smith v. Commercial Union Ins. Co.*, 33 U. C. Q. B. 90, 91.

III. Having reference to the Registry Act of Ontario, 31 Vict., cap. 20, sec. 67, Hagarty, C. J. C. P., remarks in *Millar v. Smith*, 23 C. P., p. 54, as follows: I have no doubt that the Legislature, if their attention were called to it, would correct a very serious effect which this 67th section may have. The intention was evidently to protect an innocent purchaser who had not actual notice when he effected his purchase; but the

## SUGGESTIONS FOR THE AMENDMENT OF THE LAW—THE ADMINISTRATION OF JUSTICE ACT.

section is worded so as to refer the notice to the time of the registration, instead of the time of purchasing or paying his money."

IV. In view of the assembling of the Ontario House during this month, we may here be permitted to call attention to a curious blunder in "amending" the law which has had the effect of wiping out of our statute book that most valuable provision to be found in C. S. U. C., cap. 90, sect. 11, whereby contingent, executory and future interests in land may be seized and sold in execution by the sheriff. This most unfortunate result was blundered into by the following cunning manipulation. The above section was repealed and a new section to much the same effect substituted therefor by 24 Vict., cap. 41, sec. 8. But by 29 Vict., c. 24, sec. 2, the act 24 Vict., cap. 41, was repealed from and after the 31st Dec., 1865; and no subsequent enactment has restored the beneficial provision, to which we have called attention.

### THE ADMINISTRATION OF JUSTICE ACT.

On the first day of January there comes into force that most important enactment "The Administration of Justice Act." It will effect great and necessary improvements in the administration of justice in civil cases, and would seem to be the first step towards a more complete system of procedure, enabling suitors to obtain full justice in a direct way from the tribunal to which they resort, unencumbered by needless technicalities, and unembarrassed by questions of jurisdiction.

The "Law Reform Commission," appointed to enquire into the present system, with especial reference to the "fusion," as it is called, of law and equity, were at first disposed, it is believed, to suggest a measure of a partial character, but it was understood that the

then administration, in which Mr. Crooks was Attorney General, objected to anything partial or incomplete, and desired immediate and thorough "fusion." A bill with this end in view was prepared by two of the commissioners, and printed as a basis for discussion by the commission. This bill covered a large portion of the work necessary to a complete procedure, but, before the day appointed for the meeting of the commissioners to discuss it, the commission was, for some reason, rescinded.

We think the first view of the commissioners, or of some of them, to effect the desired improvement by gradual changes, was the safer and better course, and it is the one which the present Attorney General, Mr. Mowat, has adopted. A complete change revolutionizing the whole system could not have been made without the greatest embarrassment to the judges and to the profession, and, what is not less important, great loss and inconvenience to suitors. If based entirely on common law views, the chancery judges and practitioners would have been at fault; if the whole common law practice and rules were at once abrogated, and chancery procedure pure and simple, enacted in their stead, the whole business of the courts must necessarily have fallen into the hands of the chancery practitioners at Toronto, and two-thirds of the judges would be at once required to administer an entirely new and unfamiliar code of procedure. And it is obvious that confusion, delay, and an enormous increase in law costs must have followed. Such a change would have been a great evil, and would not long be tolerated by the profession at large.

Mr. Mowat has taken the middle and, as we think, the safer course. He has not ignored the condition of things in the country; he has not lost sight of the fact that, probably, three-fourths of the Bar of Ontario are only exercent in one branch of

## THE ADMINISTRATION OF JUSTICE ACT—CURIOSITIES OF LAW.

procedure, that they have little acquaintance with the details of chancery practice. His act, while correcting some admitted defects in the law, and in procedure, and modelled with a very decided equity expansion, does not disturb the existing tribunals, does not abrogate any existing system, nor unduly favor either; it apparently is designed to familiarise those having the conduct of business in the courts, with the application of equitable doctrines and rules by means of an ordinary common law procedure for the most part; in a word, it is not a revolutionary measure, but a safe reform, educating for a more complete change. No doubt it is in a certain sense experimental, and one quite understands there is more or less repulsion to change in the well ordered legal mind; and with those educated in a particular practice, and familiar with it for many years, a prejudice not unnatural is fostered by the indisposition to enter upon the labour required to master a new one; but we are sure that all whose duty it will be to administer the new law will be willing to encounter what is necessary and disposed to give the new law a fair trial. Its practical value must depend a good deal on such favourable disposition.\*

One thing is certain, that the strong and general feeling in favor of radical reform in our system of procedure, will find

\*The English Judicature Act is also entering on trial. A paper recently read before the Metropolitan Law Association, speaking of the Act, says: "It was a great experiment. Whether it will turn out for the next twenty years, until a new race of men are the Bar and the Bench, a blessing or a curse would depend on the temper in which the common law judges interpreted and adopted it." The English Act no doubt works a complete change, and almost wholly in the common law practice, while Mr. Mowat's Act deals with the subject only in part, and in a fairer spirit we think to the practitioners in Ontario; but still there can be small doubt what the result will be if the judges receive it in a captious, hostile spirit.

vent in some way, and if cautious and gradual changes are not accepted large and sweeping ones will be rashly and recklessly urged forward in their stead. We have endeavored, in former numbers, to assist to a proper understanding of some of the leading provisions of the new Act, and, as they come to the test of actual practice, we shall endeavor to keep our readers early advised of the cases and decisions as they occur, for we wish to see the new law fairly tried and candidly judged.

## CURIOSITIES OF LAW.

The island of Jersey has long been notable for its singular system of law and the still more unique manner in which it is administered. Cases occasionally crop up which inform the outside world of the progress of jurisprudence in its insular peculiarity under the presidency of the sage jurists of Jersey. Such was the petition of *The Jersey Bar* heard before the Privy Council and reported in 13 Moo. P. C. C. 263, from which it appears that the six advocates who practiced in the *Cour Royale* objected when the Bar was thrown open by the act of 1859, and in any event claimed compensation for the loss of vested rights. Notwithstanding their exceeding pluckiness in bringing the hardship of the case before the Privy Council, yet they took nothing by the appeal.

There is at present another case pending in appeal before the same august tribunal from the decision of the ten judges of the Royal Court of Jersey. From time whereof the memory of man runneth not to the contrary the jurists of Jersey have been wont once in each year on the opening of the Court of Heritage to dine together in a hotel at St. Heliers. The records of the Court are said to contain entries so far back as the year 1616 regarding dinners "being provided as



## CURIOSITIES OF LAW—THE OFFICE OF COUNTY JUDGE IN ONTARIO.

theretofore," so that the right by prescription appears to be well founded.

However, this custom does not merit the fine commendation that we can bestow upon a like observance as perpetuated in the borough of Chippenham, Wilts. The Record Commissioners, some years ago, issued circular questions to the municipal corporations of England and Wales requesting various items of information. Among such questions was the following:—"Do any remarkable customs prevail, or have any remarkable customs prevailed within memory, in relation to the ceremonies accompanying the choice of corporate officers, annual processions, feasts, &c., not noticed in the printed histories or accounts of your borough? Describe them, if there be such." Whereunto the response came from the borough of Chippenham: "The Corporation dine together twice-a-year, and pay for it themselves!" *Report of Record Commissioners: 1837, p. 442.*

The Jersey jurists claim that Her Majesty's treasury has hitherto defrayed the expense of these judicial revels, and that such liability is by prescription eternal. However, the officer of the Treasury for the last few years has refused to pay, and the landlady of the Royal Yacht Club Hotel commenced her suit for £95 11s., the cost of six dinners, against the Attorney General of the island, the Viscount or Sheriff, and the Queen's Receiver. The ten judges who sat upon the case, being the recipients of the dinners in question, had no difficulty in finding that the defendants were liable for the amount, with costs of suit. The Crown could adduce no evidence of a time when these dinners had not been furnished forth as manifested by the records of the Court, and prescriptive right triumphed. The Attorney General of the Island has appealed to the Privy Council, where this new doctrine of prescription will be fully discussed.

We are able to recall but one authority which the Jersey Bench can possibly cite on the question of prescription, and that will unfortunately make against them. It is to be found in an *Athony-mous* case reported in 2 Leon. R. p. 12, which was an action on the case under the statute of Winton (13 Eliz. I. of Winchester), making the men of the Hundred liable to make reparation for a robbery committed within their bounds. And in the course of the case, Manwood, Justice, said: "When I was servant (*serviens ad legem*), to Sir James Hales, one of the Justices of the Common Pleas, one of his servants was robbed at Gadd's Hill within the hundred of Gravesend in Kent, and he sued the men of the hundred upon this statute; and it seemed hard to the inhabitants there that they should answer for the robberies done at Gadd's Hill, because robberies are there so frequent, that if they should answer for all of them they should be utterly undone. And Harris, Serjeant, was of council with the inhabitants of Gravesend and pleaded for them *that time out of mind, &c., Felons had used to rob at Gadd's Hill and so prescribed*; and afterwards, by award, they were charged."

### THE OFFICE OF COUNTY JUDGE IN ONTARIO.

By His Honour JAMES ROBERT GOWAN, *Chairman of the Board of County Judges.*

The office of County Judge in Ontario is one peculiar to this Province, and of great importance—whether regarded in respect to the extended and varied range of subject, or the large powers given to be exercised by the judge, for the most part in a summary manner, and without appeal. The duties of the Local Judge in Upper Canada, at first confined to a single court of civil, and very limited jurisdiction, have been gradually extended by Legislative enactments, so that the

## THE OFFICE OF COUNTY JUDGE IN ONTARIO.

County Judge of the present day presides over six distinct tribunals in his judicial district. And not only this, but the office has been overlaid by multitudinous duties of various kinds, imposed by various Acts of Parliament; and the business proper of the court, which has given the name to the office, now constitutes only an item in the aggregate duties of the judge.

Local Courts were created in Upper Canada shortly after its conquest. Their origin may be dated back as far as 1787. In November, 1791, Upper Canada was separated from Lower Canada, and began to legislate for itself. In 1794 additional courts were organized in Upper Canada, and placed on a better footing, but the jurisdiction of the County Courts, formerly called District Courts, was at first purely local, and their process had no effect beyond the local limits. Now established in every judicial district in the Province, their process, mesne and final, directed to sheriffs and coroners, runs to every part of the Province, and their practice is assimilated to that of the Superior Courts at Toronto, and within their range of jurisdiction, their powers are almost identical. The difference between them and the Superior Courts being a limit in the matter of jurisdiction, and a reduced scale of fees to officers of the court. Their steady growth from the period of their institution may be easily traced in the statutes affecting them.

So also Courts of General Quarter Sessions took their place in the early judicial establishment of Upper Canada, at first conducted entirely by justices of the peace. When the Judge of the District Court was required to be a Barrister, the conduct of business was handed over to him by the Legislature, he being made standing chairman, *ex officio*, of the Court of Quarter Sessions. These courts nearly resembled courts of Quarter Sessions in England, but while

the jurisdiction of the English courts has been gradually reduced and restrained, the jurisdiction of the General Sessions of the Peace in Ontario has been enlarged, or at least recognized as embracing nearly the whole range of offences punishable by indictment; and to it belongs a general jurisdiction in appeal from magistrates' courts in respect to all criminal convictions. Under the law of last session the county judge is now practically the sole judge of the court, for it is provided that the judge alone shall constitute a court or sittings of the General Sessions of the Peace.

A Criminal Court has recently been established—the County Judge's Criminal Court—and of this the judge is sole judge. It is a tribunal conferring new and most important powers, *viz.*: Without a jury to hear and determine, with some few exceptions, all indictable offences, felonies and misdemeanors, known to the law, save offences punishable with death, but with a right of election to prisoners to be tried by a jury, if they so desire.\*

The Division Court system in Ontario answers to the English County Courts. And we anticipated the English system, for what the people of England gained in 1846 by the "Act for the more easy recovery of small debts," the Parliament of Upper Canada granted to the people of this country by the "Division Courts Act" just five years before. The County Judge, or Junior Judge, where there is one, is sole judge of these courts (numbering as many as twelve in some counties, with sittings every two months), and decides both the law and the facts unless in certain cases either party desire a jury.

The jurisdiction of these courts, at first confined both as to range of subject

\* A return to the Legislature shows that 80 per cent of prisoners committed by magistrates for trial elected to be tried by the judge without a jury.

## THE OFFICE OF COUNTY JUDGE IN ONTARIO.

and amount, has, by progressive action of the Legislature, been more than doubled in amount, and nearly quadrupled in respect to the whole increase of actions that may be brought in them.

Under the laws relating to Insolvency, the County Judge exercises the most important powers in relation to the issue of attachments against insolvent estates, the examination and discharge of insolvents, and the collection and distribution of their estates.

In still another tribunal the County Judge is sole judge, viz.: the Surrogate Courts. These possess an exclusive jurisdiction in relation to matters and causes testamentary, voluntary and contentious, and in relation to the granting and revoking of probates of wills and letters of administration of the effects of deceased persons, similar to the Probate Court in England. The right of appointing guardians of infants to take care of their persons, and charge of their estates, belongs also to the Surrogate Courts.

Thus in six distinct courts the County Judge is sole judge, and in each and all of these, jurisdiction, both in respect to value and subject matter, has been gradually and steadily on the increase from the time of their institution up to the present—and every session of the Dominion Parliament and of the Local Legislature provides additional work for the local judges.

But, as already mentioned, the duties of the County Judge in Ontario are not confined to his courts. He is the "Judicial, or rather jurisprudential, servant of all work," a most convenient functionary on whom to impose duties requiring knowledge, impartiality and discretion for their due discharge; and for local administration the county judges are conveniently resident all over the Province. The County Judge appointed to office, in addition to the duties then assigned to him by law, no doubt tacitly undertakes

to perform to the best of his ability any duties of a judicial character which the Legislature may from time to time impose upon him; but there is certainly no undertaking, if there be a liability to perform business of a non-judicial character. The great accumulation of duties outside the courts, heaped upon County Judges by statute, is no doubt a high Legislative testimony on their behalf—as implying that their work had been, and confidence that it would be well and satisfactorily done—but the fact that extra work done by them costs nothing to the country, may not have been without its weight. However that may be, for many years no session passes without some new and additional work being given by statute to County Judges, without any provision for increased payment.

It is not easy to classify the multitudinous duties made incident to the office of County Judge, but a brief reference, under general heads, may be made, indicating to some extent, their number, character and importance.

## AUXILIARY JURISDICTION.

A large share of the duties made incident to the office comes under the head of Auxiliary Jurisdiction—a jurisdiction in aid of the Superior Courts, at Toronto. Under this the County Judge may be called upon to hold or conclude the "Assize" business—to try a traverse of inquisition in lunacy—certain issues from the courts of Common Law, as well as from the Court of Chancery, and also to make assessments of damages. Witnesses in Superior Court suits may, in certain cases, be examined before them, as may also judgment debtors as to their debts, &c.—and they are empowered to deal with parties in garnishee proceedings. Moreover they are standing referees of the Superior Courts in matters of account. The County Judge hears and decides on applications in many matters

## THE OFFICE OF COUNTY JUDGE IN ONTARIO.

of the cognizance of the Superior Courts, viz.: For orders for the issue of certain writs, and in suits pending in these courts may order the inspection of documents, may make orders in respect to security for costs, allowance of bail, for particulars of demand or set off, payment of money into court, the delivery and taxation of attorneys' bills, &c. In quo warranto cases under 35 Vict., cap. 36, the evidence upon bribery charged may be taken before him, and in other questions under the same Act, he may be called upon to take the *viva voce* testimony of resident witnesses, and so on application to quash a by-law on the ground of bribery, &c.; and where the writ in a contested municipal election is returnable before a judge of the Superior Courts, he may order the evidence to be taken before the County Judge.

## CONCURRENT JURISDICTION.

Under the head of the County Judge's Concurrent Jurisdiction may be put: the powers to hear and make orders as to the issue of writs of *capias*, writs of attachment against absconding debtors, writs of replevin from either of the Superior Courts of Common Law, as to the delivery and taxation of bills of costs and restraining suits therein, &c. They may enquire also as to the wrongful holding of writs, books and papers entrusted to a sheriff's deputy or other officer, and order them to be given up.

The County Judge has also cognizance of offences against the Foreign Enlistment Act. Under the Extradition Act he may issue a warrant for the apprehension of any person charged, and dispose of question raised. Under the Act respecting the prompt and summary administration of criminal justice, he is empowered, if the party consents, to dispose summarily of certain offences. And under the Act respecting the trial and punishment of juvenile offenders, he is authorized to act with all the powers of two

justices for conviction, &c. For convenience and avoidance of expense he has authority, too, respecting bailing parties finally committed for trial by justices of the peace in all criminal cases, short of capital offences, upon application to him, being authorized to make the same order touching the prisoner's being bailed or continued in custody as if brought up on a *Habeas Corpus*.

County Judges have concurrent jurisdiction with the judges of the Superior Courts in the of trial contested municipal elections.

## SPECIAL AND PECULIAR JURISDICTION.

The most extensive head of the County Judge's duties outside the business proper of his courts is the original, Special and Peculiar Jurisdiction conferred by numerous Acts. This branch would admit of several sub-divisions, but some indication of its range and importance is all that it is designed to give in this paper, so that a brief reference will suffice.

Under the jury law the County Judge has important duties in receiving and examining jurors' books, selecting jurors to serve for each year, seeing that proper lists are made out and transcribed into jury books, and examining and certifying the lists prepared from the selection made for use during the year.

Under the school law he is specially empowered to deal with the wrongful detention of books, papers, chattels, or moneys belonging to school sections, with adequate powers to punish delinquents. He is required to act with nominees of the council to determine complaints as to school sections, their formation, alteration, &c., and by-laws and resolutions respecting them.

He decides, as sole judge, all matters in difference between teachers and trustees. He investigates complaints respecting school trustee elections, confirms or sets aside and orders a new election, and

## THE OFFICE OF COUNTY JUDGE IN ONTARIO.

has power to deal with returning officers at such elections, acting partially, &c.

In cases of malfeasance of corporate officers he is required to make investigations as occasion arises.

The decision of disputes where wardens of adjoining counties are unable to agree respecting the maintenance of boundary lines, belongs to him.

If toll roads are in his county, and it is alleged that they are out of repair, he examines summarily into the matter, being invested with authority to act, in correction of the default.

Where persons refuse to deliver up public lands on the application of the Commissioner of Crown Lands, the County Judge may order the issue of process to give possession.

Where lands are required for a telegraph line, &c., he also makes orders as to the delivery of possession of them, and may take evidence as to, and determine the value of such lands.

And also where Railway Companies require land, and the owner is absent or unknown, the County Judge has important powers as to the determination of the value thereof and ordering possession either before or after the value is determined.

The County Judge has also power as to the conviction, fine and imprisonment of persons improperly withholding sheriffs' books, &c.: for enforcement of award in cases of dispute between masters and workmen: as to taking accounts, making enquiries and directing sales of the estate and interest charged with lien of mechanics. In respect to adverse claims for goods made upon carriers and other bailees, where the value does not exceed \$200, he is required to exercise interpleader powers for their determination.

In respect to alleged lunatics, the County Judge is required to examine and pronounce on their state of mind, to make order as to their maintenance, or direct

an issue in respect thereto, to make enquiries as to their estate, and sanction the sale of it when necessary.

A most important and onerous branch of his jurisdiction is in respect of the partition and sale of real estate; and the duties of the County Judge as "real representative" are frequently of a very difficult and laborious character.

To save the expense of resorting to the Superior Courts, a jurisdiction in ejectment was also given to the County Judge, as between landlord and tenant (it falls under this head). Trials under the Overholding Tenants' Act commonly involve as much time as the trial of an issue in ejectment, and the disposal of difficult questions of law and fact.

Under the recent Act for the improvement of water privileges, new and very large powers are granted to the County Judge, in the interests of material progress, viz: as to the entry on adjoining lands on application of the owner of water privileges, and to enable their utilization. Surveys and levels are to be made and taken under his direction, plans are prepared, and he makes orders respecting the matter.

Under the election laws he may require the clerk of the municipality to produce the assessment rolls and voters' lists before him, and upon a judicial examination may order corrections to be made in same.

In case of default by the clerk of a municipality respecting the voters' list the judge is required to examine into the matter, and summarily make order to enforce the completion and delivery of the list.

It will be noticed that the subjects under this head, Special and Peculiar Jurisdiction, are in nearly every case given to the County Judge for his sole adjudication; but it is not thought necessary to give a distinct head to subjects falling within the exclusive jurisdiction of the

## THE OFFICE OF COUNTY JUDGE IN ONTARIO.

local judge, a critical analysis of the several duties not being attempted.

## APPELLATE JURISDICTION.

The appellate jurisdiction of the County Judge is exercised partly at the sessions, and partly at chambers, according to the matter and nature of the appeal. He determines all cases of appeal against summary convictions by justices of the peace, hears and determines appeals under the assessment law from the several Courts of Revision, numbering from ten to forty, according to the extent of his judicial district. His duties herein are most important, and his jurisdiction is exclusive and final—the particular points need not be mentioned—suffice it to say, that the right of parties to be placed on the roll, the capacity in which they are to appear there, the nature of the property assessed, and the under or over assessment, speaking in general terms, are all grounds of appeal; and incidentally is determined the qualification of voters under the franchise law; this last a duty given to judicial officers, Revising Barristers, appointed in England for the sole purpose.

In connection with assessment appeals, undoubtedly the most important one of all is that from the equalization made in assessment rolls of the several municipalities in the county. Upon these the County Council, an elective body representing every part of a county, and numbering sometimes as many as forty three Reeves and Deputy Reeves, make what the Legislature designed should be a fair and just equalization; but from local prejudices or irregular considerations, equalizations made were not always accepted as just and fair towards certain municipalities, and the Legislature gave them an appeal to the local judge, and intrusted him with the correction of what might be found unjust, conferring upon him the unrestricted power to equalize the whole assess-

ment of the county, as in his opinion might be just. This has been found to be a most delicate, as well as a distasteful and onerous duty, involving very extended enquiries. But it appears the Legislature could see no other way to give cheap redress to municipalities aggrieved, and the local judge is found a convenient medium.

Appeals are also given to the County Judge in respect to by-laws of a municipality for deepening streams, draining property, &c.; from assessments made upon real property benefited by improvements proposed in a municipality; from the decision of fence viewers on conflicts as to line fences and water courses; and under the recent drainage Acts, several matters are made subjects of appeal to him.

## MINISTERIAL DUTIES.

In cities, and in towns having a police magistrate, the County Judge is constituted one of the Board of Police Commissioners, having the appointment and dismissal of the men constituting the police force, the fixing of the remuneration, the regulation of their duties, and the general management and supervision of the whole force. This mixed duty may be placed under this head, but the mere ministerial duties of the Judge are few—chiefly confined to the administration of oaths to officers, taking bail in civil cases, and in regard to books for registry offices.

## POWER OF APPOINTING ARBITRATORS.

The County Judge's duties as to the appointment of arbitrators are found in various statutes relating to Railways, Joint Stock Company roads, Toll roads, Municipalities, Drainage Works, respecting Traction Engines, and under the provisions of the Act providing for cases where the Governor in Council dissolves certain companies.

## THE OFFICE OF COUNTY JUDGE IN ONTARIO—THE LAW RESPECTING BAIL.

## MISCELLANEOUS DUTIES.

The duties of a general character not appearing to fall aptly under any of the foregoing heads, are found all over the statute book, and embrace a variety of subjects, *e. g.*; making orders allowing married women to convey their real estate when the husband does not join in the deed. The examination and approval of the securities of several officers connected with the administration of justice, declaration of officers as to fees, the auditing accounts connected with criminal justice; under the Registry Act, in respect to plans, compelling witnesses to prove deeds, and taking proof where a witness is dead or out of the Province; respecting the enforcement of estreats, and respecting debtors in gaol, allowance for support of insane, binding minors, &c.

No analysis has been made of the duties of the County Judge under Mr. Attorney General Mowat's very valuable Act of last session, as it does not come into force till the 1st day of January, but it may be mentioned, merely, that under "the Administration of Justice Act of 1873," enlarged Equity powers are granted to the Judges of the County Courts, and in certain cases a summary jurisdiction is given to them to enquire into, and set aside conveyances of land fraudulently made by judgment debtors, and to order such land to be sold to satisfy the executions against it.

In the foregoing, no attempt is made to exhaust the subject under each head, nor is anything more designed than to present in brief outline, the several duties of, and made incident to, the office of County Judge in Ontario. It is submitted that what is set down is sufficient to shew that there is no exaggeration in the statement that the County Judge is used by the Legislature as a jurisprudential servant of all work, a most convenient functionary on whom to impose duties requiring knowledge, impartiality,

and discretion for their due discharge in the locality, that additional duties are every year imposed upon him, while the confidence so largely shown finds no expression in added remuneration for additional work imposed on the local Judge.

## SELECTIONS.

## THE LAW RESPECTING BAIL.

The practice at present prevailing of taking or requiring bail by prisoners on remand for trial is one that requires reform. Instances occur almost daily in which there is a manifest difference in the amount of security required as bail, when the offence and the circumstances are the same. This necessarily causes dissatisfaction with this branch of the administration of justice.

By the ancient common law all crimes, felonies, and misdemeanors were bailable. This was altered by the Statute of Westminster, 6 Edw. 1, c. 9. It would appear that before that time sheriffs and bailiffs, who then acted as our justices of the peace, had been in the habit of letting out prisoners charged with grave offences on bail; but by this Act they were inhibited from doing so in treason, murder, and all cases of aggravated felony; they were still allowed to admit to bail "such as be indicted of larceny," that is, indicted before the sheriffs and bailiffs, or in cases of light suspicion or petty larceny that amounted not above the value of 12d. The Statute further provided that the sheriff should take sufficient security, or be otherwise answerable himself, and ends with these remarkable words: "And if any withhold prisoners replishable after that they have offered sufficient security, he shall pay a grievous amercement to the king; and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the king." There was a distinction between a prisoner mainprizable and bailable. The statutes affecting the former are 27 Edw. 1, St. 1, and 3 & 4 Edw. 3 c. 2. The justices mentioned in these Acts were justices of assize, not justices of the peace. The "*bones gentz et loialx en chescun countee a garder la pees*" were not then assigned; the sheriffs and bailiffs acted as magis-

## THE LAW RESPECTING BAIL.

brates. By 1 & 2 P. and M. c. 13, however, "an Act touching bailment of persons," the duties of justices of the peace in taking bail were clearly recognized and regulated, provisions were made for the observance of the Statute of Westminster, and that bail in many cases should only be granted before two justices of the peace in open session instead of as theretofore had been the practice, but giving power to justices and coroners in the city of London and County of Middlesex, and in other cities, boroughs, and towns corporate in England and Wales to let to bail "felons and prisoners in such manner and form as they had been heretofore accustomed," and the said Act "or anything to the contrary notwithstanding." The other old statutes relating to bail were 23 Hen. 6, c. 9, and 3 Hen. 7, c. 3. The state of the law continued virtually the same from that time down to 11 & 12 Vict. c. 42; but from the records of history it is clear that justices of the peace and judges generally had been in the habit of requiring such heavy bail before persons in custody were released as to be prohibitory, and the beneficence of common law in favour of freedom was by a pretence set aside. This was one of the grievances so justly complained of during the reigns of the two last Stuarts, and as a consequence a clause was inserted in the Declaration of Rights, our modern Magna Charta, to the effect that excessive bail should not be required. The next statutory interference with the law of bail was, as above stated, by the 11 & 12 Vict. c. 42, which provides (sect. 23) that where any person shall be brought before a justice of the peace charged with certain felonies, which are mentioned, "or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate," such justice of the peace "may," in his discretion, admit such person to bail, &c.; and it further provides that where any person shall be charged before any justice of the peace with any indictable misdemeanor, other than of the kind before mentioned, such justice "shall" admit him to bail in the manner provided by that section, the result being that in accepting or refusing bail the question raised is not the gravity of the misdemeanor, but the mere fact whether the costs of prosecution are payable out of the county rates. This, as

might be supposed, leads to many anomalies; for instance, under the game laws—statute 9 Geo. 4, c. 69, s. 9, is very severe against the game offence where three or more persons are in pursuit of game at night, assaulting keepers, &c., and the punishment may be sixteen years' penal servitude, yet as the prosecution for this offence is not paid out of the county rate, bail is compulsory. On the other hand, in a game law prosecution under the Larceny Consolidation Act of 1861, s. 17, the object of which was to make the taking of hares and rabbits a misdemeanor, costs for prosecution are payable out of the county rates, and therefore it is in the discretion of the justice to refuse or accept bail as he pleases. Other instances could be named in which the same anomalous power is left in the hands of committing magistrates. This calls for alteration. Great injustice is sometimes done by a refusal of bail, and no reasonable person could defend a hard and fast line based on such an arbitrary and absurd distinction as the fact whether the costs of a prosecution are payable or not out of the county rate. We have shown that by common statute law every misdemeanor was bailable, as it ought to be; but, now, if an offence against the Highway Act were committed, which is a misdemeanor, and if a true bill was found and the costs for prosecuting it were payable out of the county rates, it would lie in the discretion of the justice to refuse bail. Of course, in all cases where bail is refused, there is an appeal to a judge at chambers; but this is a costly proceeding, and as the class of persons who are brought before magistrates are, as a rule, poor and indigent, it is impossible for them to avail themselves of such a right. This clause in Jervis's Act is unfortunate. We do not wish to depreciate the two consecutive statutes called after the Chief Justice, or facilities they have given in properly conducting indictments and the administration of justice in summary convictions; but, at the same time, their tendency has been to abridge liberty in some most important particulars. Much might be said of the manner in which they have deprived the poor man of one of the most sacred rights of Englishmen, an appeal to a jury; but that is beyond the present inquiry. Another bad effect arises from this state of the law. Many justices



## THE LAW RESPECTING BAIL—DEFECTIVE LEGISLATION—SOLICITOR AND CLIENT.

have no idea what is reasonable bail. Bail which is in effect excessive, if not prohibitory, is often required, not from any wish to evade the law, but from ignorance. The large amounts one sees asked for are really repugnant to the whole spirit of our law. In 2 Hale, 125, it is laid down that the proper bail in felony should be for the principal never less than £40, and for sureties £20 each. By the statute 3 Car. 2, c. 2, s. 3, it is provided that the official before whom the prisoner shall be brought, "shall discharge said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties in any sum according to their discretion, having regard to the quality of the prisoner and the nature of the offence." It must be remembered that when Hale wrote all felonies were capital crimes, and although money has decreased in value since, the above sums are what might reasonably be required from working men, or the class ordinarily brought up at petty sessions; a less amount of course should be required in misdemeanors. The judgment of Lord Denman in *Reg. v. Badger*, 4 Q. B. 470, goes very fully into the law and duties of justices in questions of bail, and is well deserving the attention of every one whose position requires him to act in cases of this description.—*Law Times*.

## DEFECTIVE LEGISLATION.

We noticed last week a paper read by Mr. Holland, at a Social Science Congress, on the framing of Acts of Parliament. We have now received a print of what may be called a fellow to it, namely, a paper entitled "Some suggestions as to the means of improving the framing and passing of Acts of Parliament," by the President of the Incorporated Law Society, Mr. F. H. Janson. Mr. Janson quotes from the opinions expressed by the judges of the Court of Queen's Bench, in the case of *Solomon v. Isaacs*, which we noticed particularly at the time they were uttered, censuring severely as they did the system of incorporation and repeal. The paper contains also illustrations of bungling legislation in the case of the Public Health Act of last year, which in the power it confers upon the rural sanitary authority refers to five distinct classes of Acts. "My own inclination," says Mr.

Janson, in concluding his paper, "would point to the constitution of a board of official draftsmen, to whom at an early stage all bills should be referred; and who should possess similar authority to that exercised by the Chairman of Committees of the House of Lords in regard to private Bills; whose duty it would be to see that each Bill was at all events consistent in itself, and calculated to carry out its ostensible objects, and who should be authorized, in case of need, to alter it accordingly. If it should undergo any further change in either House, I would propose that it should be again referred to this board for final consideration and settlement before the third reading; and I think that such board should have some power to stop the passage of a Bill which at its last stage was still manifestly defective. The employment of experts in the art of drawing would insure more precision, and, what is much needed, greater condensation of language. All this would of course tend to delay legislation; but Acts of Parliament must be passed with more deliberation if they are to be free from the defects complained of, and worthy of the august assembly from which they emanate. At present no one is responsible for their being accurate in diction or capable of working, and the consequences are those which I have endeavoured to point out, and which I think it will hardly be disputed, call loudly for 'the amending hand.'"—*Law Times*.

SOLICITOR AND CLIENT—  
PRIVILEGE.

The circumstances under which a solicitor cannot be compelled to disclose his client's address were discussed by James, L. J., in *Ex parte Campbell, In re Cathcart*, 18 W. R. 1056, L. R. 5 ch. 703. In his lordship's view, if a solicitor knows where his client is from some source other than the confidential statement of the client himself, made *sub sigillo confessionis* for the purpose of obtaining the solicitor's professional advice and assistance, the solicitor cannot protect himself on the ground of his client's privilege; and in such a case it is immaterial that he gained his knowledge of his client's residence solely in consequence of being his legal adviser. If, however—we continue to state his lordship's view—

## SOLICITOR AND CLIENT—CONTINGENT FEES.

the client is in hiding, or is concealing his residence, and the solicitor is in a position to say that he only knows his client's residence because the client had communicated it to him confidentially as his solicitor for the purpose of being advised by him, then the client's residence is a matter of professional confidence.

The recent case of *Heath v. Creelock*, L. R., 15 Eq. 257, seems to fall within this latter description. It came before the court on an application by the plaintiffs that the defendant's solicitor should disclose the address of their client. The defendant was a trustee who had acted fraudulently and gone abroad. He was defending the suit; and the plaintiffs, being desirous of serving notice of a *subpœna ad testificandum* upon him personally, made the present application.

The principal authorities adduced in support of the motion were *Ramsbotham v. Senior*, and *Burton v. Earl Darnley*, 17 W. R. 1057, L. R. 8 Eq. 576, in note. In both these cases the whereabouts of wards of court was being concealed for the purpose of keeping them out of the reach of the court, or of the guardian appointed by the court; and it was held by Vice-Chancellor Malins that a solicitor is not at liberty, in consequence of any privilege of the client, to conceal any fact which may enable the court to discover the residence of its wards. It is plain that these cases afforded no support to the present application.—*Solicitor's Journal*.

## CONTINGENT FEES.

The New York *Daily Register* cautions its readers against the lawyer who contracts for contingent fees as follows:

"Beware of the lawyer who induces you to go to law on a contingency. He is not to be trusted, because he violates his obligations to his profession. It is far better for a client to pay as he goes, and more honorable to the lawyer to receive just compensation for the labor done than to wager his fees upon the chances of success. Of all vices which have tended to degrade the Bar that of contracting to conduct a legal proceeding for a contingent fee is the worst. So strong is the feeling against this practice, in some localities, that any one who resorts to it is ostracised by the profession, and cut off from his privileges as a lawyer.

It is not only wrong in principle, and against good morals, but it is unjust to client and counsel. It is unjust to counsel, because when he fails to recover he obtains no consideration for his professional services, no matter how great or valuable; and unjust to clients, because of the exorbitant charges made if success crowns the lawyer's efforts. We are inclined to think that the decline in professional honor, which is so manifest, may be more accurately measured by the prevalence of this vice than by any other means. It is the fruitful source of corruption; it induces extraordinary and unprofessional efforts to gain a cause; when success waits on the effort, its effect is to raise the spirits to a dangerous height and to create a false pride. But when a failure crowns the efforts of the over-tasked brain, a degree of self-abasement, humiliation and disappointment follow, which are fatal to one's integrity. Along the path of the profession how many tire and fall by the way, because of their over-estimate of their own powers, and their willingness to gamble on their success. Patience must have her perfect work if success is to be won."

## CANADA REPORTS.

## ONTARIO.

## NOTES OF RECENT DECISIONS.

EASTER TERM, 1873.

## QUEEN'S BENCH.

STEELE V. HULLMAN.

*Married Women's Property Act of 1872—Sec. 8 retrospective.*

Declaration on a contract by plaintiff to build a house for defendant alleging completion and non-payment.

Plea, that the making the contract and the contracting of the debt was before the "Married Women's Property Act of 1872," and that at that time defendant was, and still is the wife of T. H.

Replication, that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate use.

Held, plea good, and following *Merriek v. Sherwood*, 22 C. P. 467, that the Married Women's Act, sec. 8, is retrospective.

Seemingly, that the right to sue given by 35 Vict., ch. 16, sec. 8, is a mere matter of procedure and imposes no new liability on married women.

## Q. B.—C. P.]

## NOTES OF RECENT DECISIONS.

## [C. L. Ch.—Ch. Ch.]

## ALEXANDER V. TORONTO &amp; NIPISSING RAILWAY COMPANY.

*Railway Co.—Negligence—Contract—Limiting liability.*

Declaration under C. S. C. ch. 78, by the administrator of A, alleging that A was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages loaded with timber along the line near said station, that a piece of timber projecting from said carriage, struck and killed the said A.

Plea, that A was a newsboy in the employ of C. & Co., vending papers on defendants' trains under an agreement between C. & Co., and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents on their said trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise. *Held*, plea good without alleging that A was a party to or aware of this agreement.

*Quære*, if such a contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant.

## TIGHE V. WILKES.

*Slander—Demurrer—Special Damage.*

Declaration that the plaintiff was and is a clergyman of the Church of England, and that the defendant falsely and maliciously spoke and published of him in relation to his said profession, "he will get drunk, I have seen him drunk," meaning thereby that the plaintiff was an unfit and improper person to exercise his said calling, whereby the plaintiff was injured in his good name, and shunned by divers persons. No averment of special damage.

*Held*, on demurrer, that declaration bad.

## COMMON PLEAS.

## CLAYTON V. GREAT WESTERN RAILWAY COMPANY.

*Railway Co.—Obligation to fence—Liability.*

H., the owner of land crossed by defendants' railway, let to G. under a verbal lease for three years a certain piece of it, near to but not immediately adjoining the railway, there being a small strip intervening. There was no fence along the line of the railway, but the defendants had erected in lieu thereof, at the express wish of the owner, by whom it was considered sufficient, a fence at right-angles to the railway, running to a pond, across which the owner had planted a row of willows, with which he alleged a fence would interfere, the small strip being between the pond and the railway. It appeared that G. had received the plaintiff's horse to pasture, and on account of the water in the pond being low, the horse got out of the pasture field round the fence, and thence across the small strip to the railway, where it was injured.

*Held*, that the fence having been built, as it was, at the express wish of the owner, by whom it was considered sufficient, and who in fact objected to one along the line of the railway, the plaintiff claiming through him could not recover.

## COMMON LAW CHAMBERS.

## ELLIOTT V. NORTHERN ASSURANCE COMPANY.

*Revision of taxation after costs paid.*

[MASTER'S OFFICE, Q. B., Dec. 15th, 1873.]

The bill of costs in the cause having been taxed by the local master, the plaintiff paid the amount taxed without protest.

*Held*, that he still was entitled to a revision of taxation before the master at Toronto.

*Costs of demurrer books.*

[WILSON J., Dec. 1st, 1873.]

After issue joined on demurrer, but a month before Term, plaintiff prepared demurrer books. The case was subsequently referred to arbitration, costs of the pleadings, etc., to be costs in the cause.

*Held*, that the preparation by the plaintiff of the demurrer books was reasonable, and that he must be allowed costs of the same on taxation as part of the necessary proceedings in the cause before the reference.

## CHANCERY CHAMBERS.

## QUANTZ V. SMELZER.

*Answer of a co-defendant filed without authority.*

[THE REFEREE, November 15th, 1873.]

Two defendants moved to set aside a notice of hearing, and to strike the cause out of the list, on the ground that the answer of some co-defendants had been filed without authority from them, and therefore the litigation might be reopened by them.

*Held*, that the parties whose names were improperly used were the only persons who could move to set aside proceedings.

The defendants whose names had been so used subsequently moved to set aside the proceedings. The application was adjourned by the Referee before the Judge (V. C. BLAKE) at the hearing, who ordered the cause to be struck out with costs.

## CAMPBELL V. CAMPBELL.

*Interim alimony.*

[THE REFEREE, November 25th, 1873.]

The question whether the plaintiff has been guilty of adultery cannot be raised in opposition to an application for interim alimony.

## WILSON V. WILSON.

*Interim alimony.*

[THE REFEREE, November 26th, 1873.]

The fact that the defendant is willing to take back the plaintiff to live with him is no answer to an application for interim alimony.

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THE GALWAY ELECTION PETITION.

[Ir. Rep.]

## IRISH REPORTS.

## COURT OF COMMON PLEAS.

## THE GALWAY ELECTION PETITION.

TRENCH V. NOLAN, AND NOLAN V. TRENCH.

*Taxation of costs of Election Petition—Fees to counsel—Expenses of witnesses not certified by the Registrar—Expense of obtaining copies of short-hand writers' notes of the evidence—Retainers.*

Where, on taxation of costs of an election petition the Master disallowed a general retainer to the senior counsel, and cut down the fees on their briefs, it was held that he had no right to interfere with the discretion of the attorney acting *bona fide* for the interest of his client.

Several witnesses, who had not obtained a certificate from the Registrar, were paid their expenses by the petitioner. The Master disallowed this item, but the Court reversed his decision.

Sums paid to short-hand writers, for copies of the notes taken of the evidence, should be allowed.

[May, 4-9, 1873. Ir. L. T., Oct. 11th, 1873.]

This was an appeal by the petitioner against the decision of the taxing master, in taxing the bill of costs in the matter of the Galway election petition. The respondent also appealed against certain items which the master had allowed. A retaining fee of £10 10s. had been given to both the senior counsel for the petitioner. One of these retainers the master disallowed altogether, the other he cut down to £5 5s. On the brief to the two senior counsel a fee of 150 guineas was paid. Twenty guineas a day refresher, and five guineas consultation fees, were paid. A consultation was held every day during the trial which lasted fifty-seven days. The master allowed only one senior counsel, cut down his fee to 100 guineas, cut down the refreshing fee to fifteen guineas, and the consultation fee to two guineas, and allowed only forty-five consultations. The petitioner charged £474 for attending short-hand writers, obtaining their notes of the evidence, and briefing the same to counsel. This item the master disallowed. Some of the witnesses who attended to give evidence were not examined; to these the registrar refused to give a certificate. The master refused to allow the sums paid to these witnesses. Against the disallowance of all these items the petitioner appealed. The respondent objected to allowing so many consultations as forty-five; also, that the registrar had not given his certificate to witnesses till after the expiration of the judge's term of office as a judge on the rota, and that, consequently, he had no power to give a certificate, and without it the witnesses could not get their expenses. Some of the witnesses were summoned to

sustain a charge of treating. This charge was not sustained at the trial, and the judge in his judgment only found the respondent guilty of undue influence. The respondent contended that the expenses of all those witnesses who were called to sustain the charge of treating should not have been allowed by the master. At the desire of the Court both the appeals were taken together.

*Armstrong*, Serjeant (with him *Murphy*, Q. C., and *Bewley*), for the petitioner.—This application is made under 31 & 32 Vict., c. 125, sec. 41, which provides that, all costs, charges of and incidental to the presentation of a petition under that Act, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses as are by that Act otherwise provided for, shall be defrayed by the parties to the petition. The costs may be taxed in the prescribed manner, but according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery, and such costs may be recovered in the same manner as the costs of an action at law, or in such other manner as may be prescribed. The retainers to counsel, would have been allowed in the taxation of Chancery costs. To secure the services of counsel before proceedings have been actually instituted, it was necessary to give a general retainer. By the bar rules, not less than ten guineas can be given as a general retainer. This was a very exceptional case, and petitioner was entitled to secure the services of such counsel as he saw fit. The master, in allowing for the service of subpoenas, laid down a rule that two names must be inserted on each subpoena. It was necessary for us to serve subpoenas with only one name inserted, for had the names of others appeared on the subpoena, the witnesses would have been warned of the fact, and would have removed themselves, so as to render service impossible. The master should have allowed us for these subpoenas, which we only made use of when absolutely necessary. As to these short-hand writers' notes, they have been frequently allowed: *Clark v. Malpas*, 31 Bev., 554; *Malins v. Price*, 1 Phill., 590. The taxing-master in England has informed the master that costs for short-hand writers' notes are allowed. It was most useful to counsel in this case. It would have caused great delay and consequent expense if counsel had been obliged to take down notes of the evidence. As to the expenses of witnesses, some were called whom it turned out not to be necessary to examine. It was very uncertain what amount of proof would be required for some

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facts, and when these facts had once been proved we would not have been justified in taking up the time of the Court in piling proof upon proof. But we should have been most negligent had we not had these witnesses at hand to call if necessary. The expenses of the witnesses should have been allowed. It is objected on the other side that the registrar did not give his certificate till after the judge's term of office as an election judge had expired, and that he, consequently, had no power; we think he had. But the words of the Act directing the certificate are not negative, and the certificate is not a condition precedent. In England the registrar's certificate is not considered necessary. As to the fees allowed to counsel, considering the magnitude of the case, they were reasonable and should not have been cut down.

*Butt*, Q.C., (with him *Ezham*, Q.C., and *Martin*), for respondent.—The general principles on which this case should be decided are laid down in *The Southampton case*, L. R. 5 C. P. 178. All the costs which were reasonably incurred in the ordinary course of business should be allowed. Would these costs have been allowed in equity? Would a solicitor be allowed to give a general retainer by which he was entitled to the services of counsel in every cause he might engage in? If this be allowed in this case there is no reason why it should not be allowed in every *Nisi Prius* case. The putting one name on the subpoenas was a case of extra precaution. Had it been allowed the master have looked into each case to see whether such a course was necessary there. As to the fees to counsel, and the consultation fees, that is a question of amount. In the *Tamworth* case and the *Penryn* case, L. R. 5 C. P. 181, only 100 guineas were allowed to senior, and 75 guineas to junior counsel. As to the consultations they were allowed for forty-five days. The master should only have allowed them where it was necessary for the purposes of the case. Consultations were allowed even where counsel were speaking. In the *Southampton* case it was held that consultations should be held from time to time when different points and phases of the case are developed. As to the short-hand writers' notes, the short-hand writer is provided by the Act of Parliament for the convenience of the House of Commons and the Attorney-General, not of the parties. The cases cited on the other side are inapplicable. "The rule, as stated in *Malins v. Price*, only applies to an issue, and the reason is that the counsel engaged in law are not the

same as those in equity, and it is consequently necessary to instruct the equity counsel of what took place at law; but on an appeal the counsel are assumed to have notes on their briefs of what took place below." *Smith v. Earl of Eppingham*, 10 Beav. 382. There was a third counsel in this case whose duty it was to take down the notes of the evidence. The proper person to inform counsel is the counsel himself: *Crookes v. Gore*, 1 H. & N. 14. The certificate of the officer is necessary under 31 & 32 Vict., c. 125, sec. 34. It is the fault of the parties themselves if they do not take out the certificate. The certificate is meant as a defence against the witness. As to the charges of treating, the case failed altogether, but yet the expenses of the witnesses on this point were allowed. Some exception should have been made.

*Murphy*, Q.C., in reply.—The *Tamworth* and *Penryn* cases were of the most ordinary description. But in the *Southampton* case, where there was more difficulty, the master was held wrong in not having exercised more liberality. The true principle is that as between party and party there is to be a certain scale of taxation, and as between attorney and client there is to be an extension of these allowances. This is subject to some limitation, and is confined to such costs as may have been reasonably incurred: *Doe d. Ryde v. Mayor of Manchester*, 12 C. B. 474. As to the consultations, they were held by advice of counsel, and where an attorney gets a direction from counsel it is always taken into the consideration of the Court: *Foster v. Davies*, 8 L. T. N. S. 626.

KROGH, J.—The general principles upon which we should proceed in this case are clearly laid down by Bovill, C.J.—"It is impossible to lay down with exactness any rule upon the subject, but generally it would seem that all such costs should be allowed as a solicitor would ordinarily incur in the conduct of his client's business, excluding those extraordinary costs which may have been occasioned either by the default of the client, as by his incurring a contempt, or by his express instructions to employ an unusual number of counsel. It appears to us that the parties entitled to their costs under the orders, were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution or over-anxiety as to any particular case, or from consideration of any special importance arising from the rank,

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position, wealth, or character, of either of the parties, or any special desire on his part to ensure success. We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client, ought not to be allowed, nor the costs of purely collateral proceedings, upon which a party has failed, nor those which may have been occasioned by his default, negligence, or mistake." *Southampton* case, L. R. 5 C. P. 182. I will first take the petitioner's notice and his objections to the taxation. The first item of importance contained in the affidavit of Mr. Concannon, the petitioner's agent, was the retainers to counsel. The petitioner retained two leading counsel, giving them each ten guineas before the petition was filed, in order to secure their services. There was much discussion on the principle of these retainers. We cannot see the principle on which the master took five guineas off one, and allowed no retainer to the other counsel. I think there is some doubt as to whether this retainer did not retain the services of the counsel for life. We were referred to the rules of the bar which were adopted at a meeting of the bar held on May 3rd, 1864, and by them it appeared that a fee of five guineas was sufficient to retain any member of the bar for a particular court or circuit where he ordinarily practised, but the retaining fee to retain a counsel in every case was understood and there laid down to be ten guineas. This is necessary to retain a counsel before a suit is instituted. This jurisdiction did not exist at all at the time these rules were passed. These inquiries are almost invariably held in a remote part of the country. We do not think that this retainer comes at all within the descriptive particulars "court or circuit where the member of the bar usually practised," and, therefore, we think that the attorney for the petitioner was perfectly justified in securing the services of these counsel, whom he, in the exercise of his discretion, thought necessary for the proper conduct of his case, and he was quite entitled to give them ten guineas each. We are of opinion that this item should be allowed, and we will send it back for re-taxation. The next item is the case laid before the senior counsel to advise proofs. Twenty guineas were paid for this, which was cut down by the master to fourteen guineas; we cannot see on what principle. If there ever was a case, the magnitude and importance of which justified a liberal payment to counsel, this was one. It was not a very large fee, but the master has reduced it. It is a

question of principle, of grave and great importance, not only to the bar, but to the public; it is conceded that the attorney for the petitioner was acting for the benefit of his client, and that being conceded, I think it of the last importance to the public that when a solicitor thinks fit to give a proper remuneration to a counsel, his authority should not be treated with levity and set aside. I think no taxmaster, whether of this or any other court, can be as good a judge as a respectable solicitor acting *bona fide* for his client. He has the means of knowing what is just to the bar, taking into account the merit of the counsel he thinks fit to employ. We think this was a most proper fee, both in amount and principle. As to the item of the subpoenas, which is an item of very considerable magnitude, we see no reason to doubt the statement of Mr. Concannon, that it would be dangerous to serve subpoenas with more names than one. But it is stated by the master that there was an agreement that subpoenas should be allowed for each two witnesses; the matter was quite in his discretion and we decline to interfere.

As to the item of fees on the briefs of counsel, I apply all I said before to this. 150 guineas were given to each of the leading counsel; but this was cut down. I will again refer to the judgment of Bovill, C.J., in the *Southampton* case. The first question argued there was as to the fees allowed to the leading and junior counsel. "If these fees were allowed as being a uniform standard allowance without reference to the particular case, we think this course would be wrong, and that the master ought to exercise his judgment in each case, but at the same time we see no objection to the master adopting such a scale as average for ordinary cases." This was an extraordinary case. The master allowed 100 guineas as the usual fee. He should have exercised his discretion. There should be no uniform rule in a case of such magnitude. As to the consultation fees and refreshers, we do not think they should have been reduced, but we decline to interfere with the discretion of the master as to the number of consultations. As to the short-hand writers' notes, nothing delays the case so much as taking down the evidence. The machinery for taking down the evidence by means of short-hand writers, was provided by the Legislature. During the whole of this case there was constant reference made to the short-hand writers' notes which were in the possession of counsel, and after all this are we to come to the conclusion that short-hand writers are not to be paid.

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for by the parties? We think they should be paid for, but not as charges for brief, but specifically what was paid for them should be allowed, and the attorney's expenses incident to procuring them. It was said that three counsel were allowed, and that they should take down the notes. I think when a counsel is in a case he should act as counsel and not as a mere note-taker. As to the expenses of the witnesses, the registrar's certificate is not indispensable, the master should allow all witnesses, *bona fide* summoned, no matter whether examined or not. We think the party is not bound to examine every witness he summons. As to the objection that the registrar did not give his certificate till after the judge's term of office had expired, our previous decision renders it unnecessary to decide this point, but we have doubt that the registrar could give his certificate even now. As to the application of the respondent, to reduce the taxation of the master, one of the items was to disallow the fees paid to counsel for daily consultations where it did not appear that difficult points or unexpected complications had arisen during the trial. If that was so the master would have had to have re-tried, not only the Galway election petition, but also have decided what matters required consultations. As to the witnesses who were examined to prove treating, the report of the judge was generally against the respondent, and we decline to go behind that.

MORRIS, and LAWSON, JJ., concurred.

## DIGEST.

DIGEST OF ENGLISH LAW REPORTS  
FOR MAY, JUNE AND JULY, 1873.

(From the *American Law Review*.)

ABANDONMENT.—See INSURANCE, 3.

ACTION.—See COSTS, 1; EXECUTORS AND ADMINISTRATORS, 1; FRAUDS, STATUTE OF, 2; INNKEEPER.

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS; MARSHALLING ASSETS.

ADVERTISEMENT.—See AUCTION.

AGENCY.—See PRINCIPAL AND AGENT.

ALIMONY.

The court can allow permanent alimony upon a petition filed after decree of divorce.—*Covell v. Covell*, L. R. 2 P. & D. 411.

AMALGAMATION.—See COMPANY, 3.

ANTICIPATION.

W., who had a power of appointment over a fund subject to a trust to herself for life

without power of anticipation, executed the power in favor of her mother. Subsequently she purported to execute the power in favor of her husband, who was enabled, by depositing the appointment as security, to obtain advances from the plaintiff. *Held*, that the plaintiff was not entitled to impound the income of said fund during the life of W.—*Arnold v. Woodhams*, L. R. 16 Eq. 29.

APPEAL.—See TENDER.

APPOINTMENT.

A testator devised property in trust for A. for life and after A.'s death upon trust for A.'s children or some of them, as A. should by deed or will appoint. A. by will appointed a sixth of said property in trust for each of her six children living at the testator's decease for life, remainder to be held upon such trusts and for such purposes as each child should by will appoint, with limitations over in default of such appointment. *Held*, that A.'s power of appointment was well executed.—*Slark v. Dakyns*, L. R. 15 Eq. 307.

See ANTICIPATION; LIEN, 2; POWER, 1; PRIORITY; SETTLEMENT.

ATTORNEY.

By statute, notice of appeal must be signed "by the person giving the same or by his attorney." A notice of appeal signed by a clerk of the appellant's attorney, with authority of the appellant, *held*, valid.—*Regina v. Justice of Kent*, L. R. 8 Q. B. 805.

AUCTION.

Advertising a sale by auction does not amount to a contract with any one who may act upon the advertisement, that there will be a sale.—*Harris v. Nickerson*, L. R. 8 Q. B. 286.

See VENDOR AND PURCHASER, 1.

AWARD.—See SPECIALTY DEBT.

BANK.—See LIEN, 2.

BANKRUPTCY.

1. A plea that the plaintiffs' claim on a contract, giving them a fraudulent preference, must aver that proceedings in liquidation had begun or were imminent when the contract was entered into.—*McKewan v. Sanderson* L. R. 15 Eq. 229.

2. When a person had been adjudicated insolvent upon his own petition in Australia, upon a question whether a fund belonged to the insolvent in England, the court refused to consider whether claims allowed in Australia had been there properly proved.—*In re Davidson's Settlement Trusts*, L. R. 15 Eq. 383.

3. By statute all goods in the possession, order, or disposition of a bankrupt trader by consent of the true owner, of which goods the bankrupt is reputed owner, are property of the bankrupt divisible among his creditors. Certain butts of whiskey were sold by C. in Liverpool, and delivery orders sent to the purchaser, and a warrant stating that C. held said butts to the order of the purchaser, who was to pay a warehouse rent. It was shown

## DIGEST OF ENGLISH LAW REPORTS.

to be the custom of the spirit trade of Liverpool for a purchaser to allow his goods to remain in the vendor's warehouse after they had been paid for, until required by the purchaser for use. *Held*, that said custom excluded the presumption that said butts belonged to C., and that they did not pass to his trustee in bankruptcy.—*Ex parte Watkins, In re Couston*, L. R. 8 Ch. 520.

4. The bankrupts owe P. a certain cash balance at the time of their bankruptcy. Bills in part-payment had been accepted by the bankrupts and negotiated by P. and proved by the holder. P. had accepted also bills for the bankrupts for a consideration which had failed, and the bills were in the hands of third parties who had proved them. *Held*, that P. could only prove for the cash balance less the amount of the bills given in part-payment thereof.—*Ex parte Macredie, In re Charles*, L. R. 8 Ch. 535.

5. H. agreed to supply steam-power to S. for driving looms for twenty-one years at a certain rent for each loom payable in advance. The agreement might be terminated at H.'s option in case of bankruptcy of S. S. subsequently assigned the benefit of his agreement to W. H. then mortgaged his mill, containing the steam-power, and the mortgagee took possession and refused to supply W. with steam-power; and, in consequence, W. was obliged to pay a certain increased rent for steam-power. H. became bankrupt. *Held*, that said agreement was not unilateral, and that the damages were capable of being estimated and could be proved in the bankruptcy proceedings.—*Ex parte Waters, In re Hoyle*, L. R. 8 Ch. 563.

See LIMITATION; PARTNERSHIP, 2; TROVER.

BEQUEST.—See APPOINTMENT; CHARITY; CLASS; CONDITION; EVIDENCE; LIMITATION; TRUST; UNDUE INFLUENCE; VESTED INTEREST.

## BILL IN EQUITY.

The plaintiffs brought a bill to restrain the defendants from issuing a prospectus of a limited company to be formed to carry on auction and land-agency business. The bill alleged facts showing that said prospectus was calculated to make the public believe that said business of the defendants was the business carried on by the plaintiffs' well-known firm. The bill then stated that one of the defendants had been committed for trial on the charge of attempting to defraud by false checks; and that a correct report of the trial appeared in the *Times*, a copy of which was annexed; that the money in respect of which said charge was made was subsequently paid by a relative and said prosecution abandoned. *Held*, that the bill was scandalous.—*Christie v. Christie*, L. R. 8 Ch. 499.

See DISCOVERY, 1.

## BILLS AND NOTES.

Declaration upon a bill of exchange payable four months after date. Plea traversing acceptance. *Held*, that under said plea the

defendant might show that the original date of the bill had been altered to a later date.—*Hirschman v. Budd*, L. R. 8 Ex. 171.

See BANKRUPTCY, 4.

BLANK.—See CLASS.

BOND.—See PRINCIPAL AND SURETY.

CANCELLATION.—See WILL, 7.

CARGO.—See FREIGHT; LIEN, 1.

## CARRIER.

By agreement between the defendant railway and the G. N. Railway it was provided that there should be a complete interchange of traffic from all parts of one company to all parts of the other, the stock of the two companies being treated as one stock; and that the two companies should aid each other in every possible way as if the whole concerns of both companies were amalgamated. The G. N. Railway received a cow from the plaintiff to be conveyed to S., a place upon the defendant's line, under a contract which provided that the G. N. Railway should not be liable for injury caused by the kicking, plunging, or restiveness of the cow. On arriving at S., the defendant's porter began to unfasten the railway truck to let the cow out, but was warned by the plaintiff not to do so. The cow was let out into a cow-pen, jumped out of the pen, and was killed. *Held*, first, that the action was rightly brought against the defendant, as under the above agreement it was either partner with the G. N. Railway Company or the latter company was acting as agent of the defendant in making said contract with the plaintiff; and, secondly, that the defendant was liable for want of reasonable care in delivering said cow, notwithstanding the terms of said contract; and that, as a matter of fact, the defendant's porter was guilty of negligence in letting the cow out of the truck as above.—*Gill v. Manchester Railway Co.*, L. R. 8 Q. B. 186.

See RAILWAY.

## CHARITY.

A testator devised certain houses to a corporation "for this intent and purpose, and upon this condition," that it should yearly distribute £3 in certain charities; and he directed that the rest of the profits of the houses should be bestowed upon repairs; and in case the corporation should leave any of these things undone, then the testator's next of kin were to enter and hold the houses upon the same condition. At the testator's death the annual value of the property was £95.4, and its present was £330. In 1790, over 200 years after the date of the will, the corporation purchased land adjoining the devised premises, and the two estates were thrown together and built over, and now formed one set of premises. *Held*, first, that the whole of said increased annual value was applicable to charitable purposes; secondly, that said land purchased by said corporation belonged to it, and that there must be a separation and division of the two pieces of land, or an apportionment of the rents arising therefrom.—



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*Attorney-General v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; s. c. L. R. 5 Ch. 503; L. R. 8 Eq. 452; 4 Am. Law Rev. 463; Am. Law Rev. 293.

CHARTER-PARTY.—See CONTRACT, 2.

## CLASS.

Bequest "unto each of my four nieces, the daughters of my deceased brother, Y., the sum of £500." Y. had five daughters at the date of the will and of the death of the testator. *Held*, that the above blank did not affect the general rule, and that said five children took £500 each as members of a class.—*McKechnie v. Vaughan*, L. R. 15 Eq. 289.

CODICIL.—See LEGACY, 4; WILL, 5, 6, 8.

COMMON CARRIER.—See CARRIER.

## CONDITION.

A testator bequeathed £17,000 to F., provided F. relinquished, within six months after attaining twenty-one, all his interest under his father's marriage settlement. In case of neglect the legacy to be reduced to £12,000, and £5000 to fall into the residue. F. was ignorant of the legacy until more than six months after his attaining twenty-one, but subsequently relinquished his interest under said settlement. *Held*, that as neither ignorance, illness, nor neglect would excuse performance of said condition, said £5000 fell into the residue.—*In re Hodges' Legacy*, L. R. 16 Eq. 92.

See LEGACY, 6; VENDOR AND PURCHASER, 2.

CONFUSION.—See CHARITY.

CONSTRUCTION.—See APPOINTMENT; ATTORNEY; BANKRUPTCY, 3; CHARITY; CLASS; CONDITION; CONTRACT; EVIDENCE; INSANITY; LEGACY; LIMITATION; POWER, 1; RESERVATION; UNDUE INFLUENCE; USES, STATUTE OF.

CONFLICT OF LAWS.—See MARSHALLING ASSETS.

## CONTRACT.

1. V. accepted an offer of marriage from F. subject to the approval of her (V.'s) father. The father assented and wrote to F., stating: "V. being my only child, of course she will come into the possession of what belongs to me at my decease." The mother of F. wrote to V.'s father concerning his settling £4000 upon F., and the father wrote in reply that he could not take that sum from his business, but that he had made a will leaving all his estate to V. for life, remainder as she should by will appoint; he added: "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts, and of course I should settle my property on my daughter absolutely and independent of her husband, or in other words, in strict settlement. I will take care that my property shall be properly secured upon her and her children after her death." The marriage took place. V.'s father married again,

and made a will giving certain property to his wife. *Held*, that the said letters of V.'s father amounted to a contract to settle whole of the property of which he died seized or possessed upon V. in strict settlement.—*Coverdale v. Eastwood*, L. R. 15 Eq. 121.

2. The defendant chartered a vessel in France with a stipulation that the vessel should proceed with a cargo of hay to London; the cargo to be taken from the vessel *along-side*. Before the charter-party was entered into, it had been made illegal to land hay from France in Great Britain. On learning this the defendant, after some delay, received the hay from alongside the vessel in the Thames into another vessel and exported it. *Held*, that, as there was no intention to violate the law when the contract was made, and as the law was not in fact violated, the contract was not void; and that the defendant was therefore liable for said delay or demurrage.—*Waugh v. Morris*, L. R. 8 Q. B. 202.

See AUCTION; BANKRUPTCY, 5; CARRIER; FRAUDS, STATUTE OF, 1; FREIGHT; INFANT; INSURANCE, 2; RAILWAY, 1; TRUST.

CONTRIBUTORY.—See COMPANY, 4.

## COPYRIGHT.

By statute copyrighted prints must be engraved with the name of the proprietor. The plaintiff's engravings were marked "Rock & Co., London." *Held*, that the proprietor's name was sufficiently set forth on said engravings. *Rock v. Lazarus*, L. R. 15 Eq. 104.

CORPORATION.—See WRIT.

## COSTS.

1. Where A. has been subjected to a suit for unliquidated damages through the default of B., who declines to intervene, and judgment has been rendered against A., the right of A. to recover from B. the costs of defending such action depends upon whether it was reasonable in A. to defend such a suit, a question to be left to the jury.—*Mors-les-Blanch v. Wilson*, L. R. 8 C. P. 227.

2. Rule for a new trial, "costs to abide the event." *Held*, that the "event" was the event of the trial as to the ground on which the verdict was set aside.—*Jones v. Williams*, L. R. 8 Q. B. 280.

CRIMINAL LAW.—See EMBEZZLEMENT; INDICTMENT; LARCENY.

CUSTOM.—See BANKRUPTCY, 3.

## DAMAGES.

The plaintiff carried on business in a warehouse held on long lease, and next to a free dock on the Thames. The dock was filled up under certain embankment acts, and the plaintiff's premises thereby permanently injured with reference to the uses to which he or any owner might put them. *Held* (by KELLY, C. B., BLACKBURN and ARCHIBALD, J. J., and BRAMWELL, B.; CLEASBY B., dissenting), that the plaintiff was entitled to compensation. See Land Clauses Consolidation Act, 8 & 9 Vict. c. 18, § 68.—*McCarthy*

## DIGEST OF ENGLISH LAW REPORTS.

*v. Metropolitan Board of Works*, L. R. 8 C. P. (Ex. Ch.) 191; s. c. L. R. 7 C. P. 508; 7 Am. Law Rev. 508.

See BANKRUPTCY; 5; PRESCRIPTION; RAILWAY; RESERVATION; SPECIALTY DEBT.

## DEED.

A letter of orders under the seal of a bishop is not a deed.—*Regina v. Morton*, L. R. 2 C. C. 22.

See RESERVATION; USES, STATUTE OF.

DEMURRER.—See DISCOVERY, 1; FRAUDS, STATUTE OF, 1.

DEVIATION.—See INSURANCE, 1.

## DEVISE.

1. A testator gave the residue of his estate in trust "for my nephews and nieces living, and the issue of any of my nephews and nieces dead before me." The testator had brothers and sisters, but no nephews and nieces, but there were several nephews and nieces of his wife. *Held*, that the wife's nephews and nieces were entitled to the gift.—*Sherratt v. Mountford*, L. R. 15 Eq. 305.

2. Judgment in *Allgood v. Blake*, reported in English Digest of last number of Am. Law Rev., affirmed in 8 Ex. (Ex. Ch.) 160.

3. A testator devised a certain estate to his son J. for life, remainder to J.'s children in fee, "and in case my son J. shall depart this life without leaving lawful issue" such estate "equally between my sons G. and R. in the same manner as the estates hereinafter devised are limited to them respectively; subject nevertheless to the proviso hereinafter mentioned, in case my son J. should leave a widow." The testator then devised certain other estates to G. and R. in identical terms. Then followed this proviso: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them dying, unto his widow" for life. R. died unmarried. G. died leaving a widow, who claimed a life estate in the moiety of R.'s estate, which had come to G. *Held*, (reversing judgment of Ex. Ch., which reversed judgment of C. P.), that said widow was entitled to a life-estate in said moiety of R.'s estate.—*Giles v. Melsom*, L. R. 6 H. L. 24; s. c. L. R. 6 C. P. (Ex. Ch.) 532; L. R. 5 C. P. 614; 6 Am. Law Rev. 294; 5 id. 478.

See CHARITY; CLASS; CONDITION; EVIDENCE; LIMITATION; TRUSTS; UNDUE INFLUENCE; VESTED INTERESTS.

## DISCOVERY.

1. Bill by reversioner against tenants holding under an expired lease and underlease, alleging that the defendants were in wrongful possession of certain land, and that they had in their possession documents which would show that said land was included in said lease and underlease, and praying discovery, and also alleging collusion between the defendants to defeat the plaintiff. Demurrer overruled.—*Brown v. Wales*, L. R. 15 Eq. 142.

2. The court refused to order a solicitor to disclose the address of his client who had

absconded, for the purpose of enabling the plaintiff to serve upon the client a *subpoena duces tecum*.—*Heath v. Crealock*, L. R. 15 Eq. 257.

3. A plaintiff will not be compelled to produce documents relating to his title, and which he swears do not contain anything supporting the defendant's title or case to the best of the plaintiff's knowledge, information, and belief. Nor correspondence between the plaintiff and his predecessors in title and their solicitors, having reference to questions connected with the matters in dispute in the case.—*Minet v. Morgan*, L. R. 8 Ch. 361.

See INTERROGATORIES; PATENT, 1.

## DOMICILE.

The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. Discussion of the question of domicile.—*Wilson v. Wilson*, 2 P. & D. 435.

DRUNKENNESS.—See WILL, 7.

EASEMENT.—See DAMAGES; PRESCRIPTION.

ELECTION.—See PARLIAMENTARY LAW.

## EMBEZZLEMENT.

The captain of a barge, while in the exclusive service of the owner of the barge, took a cargo which the owner had forbidden him to carry, and never accounted for the freight. *Held*, that said captain was not guilty of embezzlement, as he did not receive said freight "for, or in the name or on account of his master," under 24 and 25 Vict. c. 98, § 68.—*Regina v. Cullum*, L. R. 2 C. C. 28.

EQUITY.—See JURISDICTION; LIMITATIONS, STATUTE OF; MISTAKE; POWER, 2; SETTLEMENT, 3, UNCONSCIONABLE BARGAIN; VENDOR AND PURCHASER, 1.

## ESTOPPEL.

The plaintiff, the executor under a will, gave notice of the existence of the will to the defendant, the executor under a previous will, and entered a caveat. Before contentious proceedings the plaintiff withdrew the caveat, stating to the defendant that he did not intend to prove the last executed will, and that he was willing that administration under the first executed will should be granted to the defendant. Subsequently the plaintiff obtained a citation calling upon the defendant to bring in the administration, and he filed his declaration setting forth the last executed will. *Held*, that the plaintiff was not estopped from maintaining the action.—*Goddard v. Smith*, L. R. 3 P. & D. 7.

See LIMITATION.

## EVIDENCE.

A testator gave legacies to J. B., N. L., and J. D. C. W., curates of the T. Church. At the time of the testator's death, said first two persons, together with a third person, were curates of said church; but said J. D. C. W. never had been a curate of the church. *Held*, that evidence to show that it was not the testator's intention to give a legacy to said W. was inadmissible.—*Farrer v. St.*

## DIGEST OF ENGLISH LAW REPORTS.

*Catharine's College, Cambridge*, L. R. 16 Eq. 19.

See DOMICILE; LIBEL; RAILWAY, 2; WILL, 3, 5.

## EXECUTORS AND ADMINISTRATORS.

1. Executors carried on the testator's business as authorized by him. The plaintiff alleged that he had become a creditor since the testator's decease, and, on behalf of himself and all other creditors of the testator, prayed for general administration of the testator's personal estate, for a receiver, and for accounts, without suggesting insolvency of the estate. *Held*, that the plaintiff's remedy was by action at law.—*Owen v. Delamere*, L. R. 15 Eq. 134.

2. A married woman died intestate in 1856. Her husband was last heard of in Australia, in 1853. The court refused administration to the woman's next of kin without citing the husband or his representatives.—*In the Goods of Nicholls*, L. R. 2 P. & D. 461.

3. The court refused to pass over the widow in appointing an administrator to an intestate's estate, although the widow had been separated by judicial decree from her husband, by reason of her cruelty.—*In the Goods of Ihler*, L. R. 3 P. & D. 50.

See ESTOPPEL; MARSHALLING ASSETS; WILL, 2, 5.

EXPECTANT HEIR.—See UNCONSCIONABLE BARGAIN.

FACT, MISTAKE OF.—See COMPANY, 3.

FALSE REPRESENTATIONS.—See FRAUDS, STATUTE OF, 2.

FRAUD.—See ANTICIPATION; LIMITATIONS, STATUTE OF.

## FRAUDS, STATUTE OF.

1. The plaintiff agreed to purchase land of A. He then verbally agreed to assign the contract to B. upon certain conditions. Subsequently the plaintiff assigned said contract to B., leaving out said conditions at B.'s request. B. paid a deposit to A. according to the terms of said contract, and then repudiated said conditions, and the plaintiff filed a bill to have said assignment set aside. *Held*, that said assignment was but machinery subsidiary to and for the purposes of the verbal agreement, and that any use of it inconsistent with said agreement was fraudulent. Also that the bill was not demurrable for want of an offer to repay to B. the deposit he had paid A.—*Jarvis v. Berridge*, L. R. 8 Ch. 351.

2. The plaintiff, being the customer of a bank, requested the bank to make inquiries concerning the credit of R. The manager of the bank wrote to the manager of a banking company inquiring R.'s standing. G., the manager of said company, wrote a reply, signed by G. as manager, in which he knowingly made false representations as to R.'s credit, in consequence of which the plaintiff supplied R. with goods, for which the plaintiff was never paid. The plaintiff sued R. and W., the registered public officer of the

company. *Held*, that G.'s signature was the signature of the company; that the representation as to R.'s credit was a representation of the bank; that, according to the custom found by the jury, it must be intended that G.'s answer was sent, not merely for the use of said bank, but for the benefit of the customer on whose behalf said inquiry was made; that the company was liable for the false representations of G. made in the course of conducting the company's business, and that in an action of tort both R. and W. might be sued jointly.—*Swift v. Winterbotham*, L. R. 8 Q. B. 244.

## FREIGHT.

The defendant shipped upon the plaintiff's vessel petroleum to be delivered at Havre, and to be taken out within twenty-four hours after arrival, or pay £10 a day demurrage. The authorities at Havre refused to permit the petroleum to be landed, and it was taken by direction of the ship's broker to Honfleur and Trouville, but permission to land was there also refused. The vessel then returned to Havre and transhipped the petroleum into lighters hired by G., but being obliged to reshipe it by the authorities, sailed back to London. *Held*, that whether there was an entire execution of the contract or not, there was such an execution as could be effected consistently with the incapacity under which the cargo labored; the plaintiff was therefore entitled to freight. Also, that, as the master had been obliged to take the petroleum out of the harbor of Havre, and had carried it back to London, the plaintiff was entitled to return freight, demurrage for detention while travelling to Honfleur and Trouville, and the necessary incidental expenses, and that there was a lien for the several charges.—*Cargo ex Argos*, L. R. 4 Ad. & Ec. 13.

See INSURANCE, 3; LIEN, 1.

## GUARANTEE.

F. gave a guarantee to a bank to continue in force until six months after notice to the bank under the hand of F. *Held*, that the guarantee was determined upon notice to the bank of the death of F.—*Harris v. Fawcett*, L. R. 15 Eq. 311.

HUSBAND AND WIFE.—See SETTLEMENT, 1, 3.

ILLEGAL INTENTION.—See CONTRACT, 2.

ILLEGITIMACY.—See LEGACY, 3.

## INDICTMENT.

1. The prisoner was indicted for setting fire to a stack of straw. It was proved that he set fire to straw on a lory, and he was convicted. *Held*, that conviction must be quashed.—*Regina v. Satchwell*, L. R. 2 C. C. 21.

2. The prisoner was indicted for receiving goods with knowledge that they had been obtained under false pretences. The false pretences were not set forth. The prisoner was found guilty. On motion in arrest of judgment, *held*, that the defect in the indictment was cured by verdict.—*Regina v. Goldsmith*, L. R. 2 C. C. 74.

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## INFANT.

An infant gave a promissory note, charging his reversionary interest with its payment, and executed a statutory declaration stating that he was of full age. After attaining twenty-one he mortgaged said reversionary interest. *Held*, that said charge was avoided by the mortgage.—*Inman v. Inman*, L. R. 15 Eq. 260.

INFLUENCE.—*See* UNDUE INFLUENCE.

INJUNCTION.—*See* PATENT, 1; UNCONSCIONABLE BARGAIN.

## INNEKPERR.

In an action for the value of goods stolen from the plaintiff at a hotel, the defendant was the manager of the hotel and the license was in her name, but all the property in the house belonged to a hotel company whose name was printed at the top of customers' bills. *Held*, that the defendant was not liable for the loss.—*Dixon v. Birch*, L. R. 8 Ex. 135.

## INSANITY.

Insanity held to be sickness.—*Burton v. Eyden*, L. R. 8 Q. B. 295.

*See* WILL, 7.

INSOLVENCY.—*See* BANKRUPTCY; LIMITATION.

## INSURANCE.

1. A vessel was insured at and from L. to the west or southwest coast of Africa during her stay and trade there, and back to a port of call in the United Kingdom; returning at a percentage varying with the period of the risk; the ship being held covered at 138*l.* 4*d.* per month if longer than twelve months out. The vessel when on the African coast remained in a port a month assisting another vessel. *Held*, a deviation.—*Company of African Merchants v. British and Foreign Marine Insurance Co.*, L. R. 8 Ex. 155.

2. A proposal for insurance on a vessel was accepted by an insurance company on March 11th. On the 17th March the plaintiffs learned that the vessel was lost, and the same day sent to the company for a policy in pursuance of the terms of said proposal. The company then for the first time asked the amount of previous insurance, and a warranty was inserted in the policy as to its amount, and the policy was then given to the plaintiff. The jury found that the company accepted the risk on March 11th. *Held*, that the addition of said warranty, which was for the benefit of the company and did not affect the risk, did not postpone the date of the contract until March 17th; and that the plaintiffs were not bound to communicate information received after March 11th.—*Lishman v. Northern Maritime Insurance Co.*, L. R. 8 C. P. 216.

3. The owners of a vessel then on a voyage to New Zealand chartered the vessel to M., agreeing that it should proceed to Calcutta, and there, "being tight, staunch, and strong, and every way fitted for the voyage," should carry a cargo provided by M. to London. The owners then insured the freight. The

vessel was injured at New Zealand, and the master being unable there to learn the extent of said injuries had some repairs made, and then proceeded to Calcutta. There he learned that the damage sustained justified an abandonment, and notified his owners thereof. The owners on receipt of this information gave the insurers notice of abandonment and claim for total loss. *Held*, that the loss of freight was caused by a peril of the sea; that no notice of abandonment need be given to insurers of freight; and that even if necessary, the notice given as above was not, under the circumstances, too late.—*Rankin v. Potter*, L. R. 6 H. L. 83; s. c. L. R. 5 C. B. (Ex. Ch.) 341; L. R. 3 C. P. 562.

## INTERROGATORIES.

The plaintiff brought suit to establish a right of common. The defendant filed interrogatories asking the plaintiff to set forth any instance when such right had been enjoyed. *Held*, that the plaintiff was not bound to answer the interrogatories. Either party is entitled to discovery of facts making out his own case, but not of matters supporting his opponent's case.—*Commissioners of Sewers of the City of London v. Glasse*, L. R. 15 Eq. 302.

JUDGMENT.—*See* CRIMINAL LAW.

## JURISDICTION.

On an application of an infant by petition for an allowance for maintenance, the court has jurisdiction to charge the expense of his past and future maintenance upon the *corpus* of an estate to which the infant is entitled in fee.—*In re Howarth*, R. L. 8 Ch. 415.

*See* LIMITATIONS, STATUTE OF; RECEIVER.

## LARCENY.

The prisoner was a depositor in a post-office savings-bank in which 11*s.* stood to his credit. Wishing to withdraw 10*s.* he obtained a delivery warrant for that sum, and presented the warrant to the post-office clerk. The clerk referring by mistake to another warrant for £3, placed £3 upon the counter, and the prisoner took the money and went away. *Held*, (by COCKBURN, C. J., BOVILL, C. J., KELLY, C. B.; BLACKBURN, KEATING, MELLOR, LUSH, GROVE, DENMAN and ARCHIBALD, J. J., and PIGOTT, B.; MARTIN, BRAMWELL, and CLEASBY, B. B., and BRETT, J., dissenting), that the prisoner was guilty of larceny.—*Regina v. Middleton*, L. R. 2 C. C. 38.

LEASE.—*See* DISCOVERY, 1.

## LEGACY.

1. A testatrix bequeathed £500 in trust for E. for life, and in case E. should leave no children at her decease, then the trustees were to divide said sum "amongst the heirs of my late brother J." She made another similar bequest in which the ultimate gift in default of the children of E. was to her nieces; and her residuary estate she bequeathed to "the five youngest children of my late brother J.," naming them. *Held*, that the word "heirs" in the first bequest must, under the

## DIGEST OF ENGLISH LAW REPORTS—REVIEWS.

circumstances, be held to signify the next of kin of J.—*In re Stevens's Trusts*, L. R. 15 Eq. 110.

2. A testator after making two pecuniary bequests gave the residue of his property to his wife for life, and after her death among his children, should there be any. There were no children. *Held*, that the wife was absolutely entitled.—*Crozier v. Crozier*, L. R. 15 Eq. 282.

3. A testator gave legacies to several persons whose relationship to himself he specified, including T., whom he described as his niece. He further directed that if the whole of his property made more than the whole amounts mentioned in his will, the residue should be divided among his relations in proportion to their separate amounts. T. was illegitimate. *Held*, that T. was not entitled to share in the residue.—*Hibbert v. Hibbert*, L. R. 15 Eq. 372.

4. A testator made a will and two codicils, giving therein no legacy to a college. In a third codicil the testator recited that he had given £1000 to said college, confirmed the bequest, and in other respects revoked said will; he also gave £5000 additional to the college. *Held*, that the testator revoked said will only; and that said college took £6000. *Farrer v. St. Catharine's College, Cambridge*, L. R. 16 Eq. 19.

5. A testatrix bequeathed all sums of money which should be due and owing to her at the time of her decease to A., with residuary bequest to B. At the time of her death, in 1781, the testatrix was one of the next of kin of her brother, who had died intestate, being the residuary legatee of his father. In 1820 a sum of money was paid into court on account of the interest said father had held in a partnership. *Held*, that the burden of the proof lay upon A. to show that said money did not fall to B. under the residuary clause, and that A. failed in such proof.—*Martin v. Hobson*, L. R. 8 Ch. 401.

6. A testator gave personal estate to a college "for the purpose of founding a new professorship of archaeology, for the regulation of which I propose preparing a code of rules." In case the college should decline to accept such rules the said legacy was to be void. The testator never prepared any rules. *Held*, that said bequest took effect absolutely.—*Yates v. University College, London*, L. R. 8 Ch. 454.

7. A mariner made a will, beginning: "Instructions to be followed if I die at sea or abroad." *Held*, that the bequests were conditional upon the testator's dying at sea or abroad.—*Lindsay v. Lindsay*, L. R. 2 P. & D. 459.

See APPOINTMENT; CHARITY; CLASS; CONDITION; EVIDENCE; LIMITATION; TRUSTS; UNDUE INFLUENCE; VESTED INTEREST.

LEX LOCI.—See MARSHALLING ASSETS.

(To be Continued.)

## REVIEWS.

SIR JOHN KELYNGS REPORT'S OF CROWN CASES IN THE TIME OF CHARLES II. Third edition, containing cases never before printed, together with a treatise upon the Law and Proceedings in Cases of High Treason, by a Barrister-at-Law. Edited by Richard Loveland, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes, Bell Yard, Temple Bar, 1873.

We look upon the volume as one of the most important and valuable of the unique reprints of Messrs. Stevens & Haynes. Little do we know of the mines of legal wealth that lie buried in the old law books. But a careful examination, either of the reports or of the treatise embodied in the volume now before us, will give the reader some idea of the good service rendered by Messrs. Stevens & Haynes to the profession.

There have been heretofore published two editions of Sir John Kelynge's Crown Cases: the first in London in 1708, folio, the second in Dublin in 1789, octavo. The principal difference between the two editions was the change of the title-page.

Sir John Kelyng was Chief Justice of the King's Bench. The cases are taken from his own manuscript. It is said by Sir Michael Foster that Lord Holt first published Sir John Kelynge's reports. The edition as first published was preceeded by a certificate in the following form:

"We do allow and approve of the printing and publishing the Reports and Cases in Pleas of the Crown, collected by the late Lord Chief Justice Kelyng, and three other modern cases added thereto.—J. HOLT. JOHN POWELL. LITTLETON ROWLS. H. GOULD."

The folio edition contained, it is said, an address from Lord Holt to the reader.

In a copy of the folio edition which recently came into the possession of Messrs. Stevens & Haynes, there was written, in an unknown hand, the following note on the margin of the page containing Lord Chief Justice Holt's address to the reader:

"But not all, for he had collected more cases and had two MS. collections of his own reports in ye Crown Law, and these here printed are in the one MSS. (tho' not all, and most fitt to be printed for public use). Ye other MSS. had some considerable cases in it (as his son, Sir John Keyling told me), those of ye Ch. Ju. Keyling, or MSS. not here printed. I have

## REVIEWS.

added in ye space in this book with reference to ye place where they should come in, had they been here printed, so with what printed and in ye spare paper wrote, make one of the MSS."

The additional cases, in which reference is here made, are published in this, the latest edition of Sir John Kelynge's Reports. They are printed in red ink, so as to be distinguished from the cases first published. Their addition to the volume has greatly increased its value.

The addition of the treatise upon the law and proceedings in cases of high treason, first anonymously published in 1793, gives still more value to this rare volume. It was originally published by the well-known king's printers, A. Strahan and W. Woodfall. The name of the author has never been disclosed. His preface to the book contains some fine passages. One is as follows:—"The brightest jewel in the Royal Diadem is Justice, and the fairest flower is mercy. The noblest attribute of the Sceptre is prerogative, which is not, nor cannot be invested in the Crown for the purposes of oppression, but is continually exerted for the good of the community." And again, "One word of the press. The liberty of the press is the *palladium* of the constitution, but its licentiousness is *Pandara's* box—the source of every evil. *Faction* leaders have in all ages called themselves *the people*; they point out to the multitude by virtue of this assumed authority grievances that exist *only in imagination* and promise those scenes of happiness which can *never* be the lot of the many."

It is not likely that there will be much call for such a volume in these days of constitutional liberty. But should occasion arise the crown prosecutor as well as counsel for the prisoner will find in this volume a complete *vade mecum* of the law of high treason and proceedings in relation thereto.

WILLIAM KELLYNGE'S REPORTS IN CHANCERY IN THE 4TH AND 5TH YEARS OF GEORGE II., DURING WHICH TIME LORD KING WAS LORD HIGH CHANCELLOR; AND IN THE KING'S BENCH, FROM THE 5TH TO THE 8TH YEARS OF GEORGE II., DURING WHICH TIME LORDS RAYMOND AND HARDWICKE WERE LORD CHIEF JUSTICES OF ENGLAND. Reprinted from the edition of 1764.

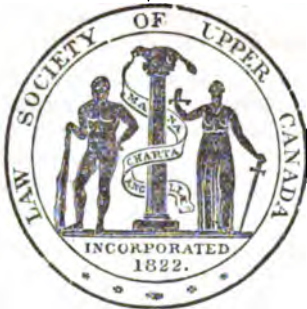
London: Stevens & Haynes, Bell Yard, Temple Bar, 1873.

This handsome volume is the sixth of Messrs. Stevens & Haynes' series of rare and valuable reprints of old reports. There were only two editions of Kelynge's reports published. The first in 1760, without the author's name. The second in 1764, folio, with seventy additional cases. This, the third, is by far the choicest edition published. The publishers assure us that it has been carefully examined before going to press, and that every case has been verified.

The editor of Kelynge's Reports was admitted a student of the Inner Temple on 25th June, 1726, and was called to the bar on 19th November, 1731. The volume contains a very small proportion of equity cases—not more than one-sixth. The remaining cases are at common law. As many of them are decisions of Lord Hardwicke, the volume is sometimes quoted as "*Hardw.*" and sometimes as "*cases King's Bench, temp. Lord Hardwicke.*" It is also quoted as "*Rep. of sel. cas. in Ch.*," occasionally it is cited as *II. Kelynge*, to distinguish it from Kelynge's Crown Cases, which are generally quoted as *1st* or *I Kelynge*. It is said that many of the cases were copied from the notes of Mr. Justice Gundry.

The edition published in 1764, like the one published in 1873, was published in Bell Yard, Lincoln's Inn. The publisher of the edition of 1764 was "John Warrall, at the Dove, in Bell Yard, Lincoln's Inn." It was he who issued folio editions of Andrew's, Bunbury, Mosely, Plowden, and Strange's Reports. He also published in quarto an ancient and interesting dialogue concerning the exchequer from two manuscript volumes, called the red book and the black book. It was originally published in Latin, and contains an account of "the greatest officers of the realm, their salaries, privileges and exemptions." It is now more than a century since these publications were issued. The enterprize of Mr. Warrall, considering the time in which he lived, was noteworthy, though not equal to that of Messrs. Stevens & Haynes, who occupy premises near where Warrall published, in the small but well known lane called Bell Yard—leading from the Strand to Lincoln's Inn.

## LAW SOCIETY—MICHAELMAS TERM, 1873.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODS HALL, MICHAELMAS TERM, 37TH VICTORIA.

**D**URING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

- No. 1270. MAXWELL D. FRASER.  
 RUPERT ETHEREDGE KINGSFORD.  
 JOSEPH BENJAMIN MCARTHUR.  
 ROGER CONGER CLUTE.  
 CHARLES OAKES ZACCHERUS ERMATINGER.  
 No. 1275. NATHANIEL F. HAGLE.

The above names are given as on the roll, and not in order of merit.

And the following gentlemen received Certificates of Fitness:

- |                              |                             |
|------------------------------|-----------------------------|
| MAXWELL D. FRASER.           | } Without oral examination. |
| GEORGE B. GORDON.            |                             |
| HANMEL MADDEN DEROCHÉ.       |                             |
| CHARLES E. BARBER.           |                             |
| EDWARD HARRY D. HALL.        |                             |
| KENNETH MACLEAN.             |                             |
| CHARLES OAKES Z. ERMATINGER. |                             |
| HENRY THOPHILUS W. ELLIS.    |                             |
| CHARLES BAGOT JACKES.        |                             |

And on Tuesday, the 18th November, the following gentlemen were admitted into the Society as Students of the Law:

*University Class.*

- RICHARD W. H. N. DAWSON.  
 JOHN E. K. GOURLAY.  
 F. M. MORSON.  
 ROBERT SHAW.  
 WILLIAM H. CULVER.  
 FRANK S. NUGENT.  
 ROBERT E. WOOD.  
 JOHN L. WHITING.  
 WALTER BARWICK.  
 FRANCIS MADILL.  
 ALEXANDER C. GALT.  
 JAMES H. MADDEN.  
 PETER L. PALMER.  
 CHARLES L. FERGOUSON.  
 RICHARD P. PALMER.  
 ALBERT A. F. WOOD.

*Junior Class.*

- PREVELYAN RIDOUT.  
 JAMES V. TRETEL.  
 JOHN ALEXANDER PALMER.  
 HARRY DUDLEY GAMBLE.  
 GEORGE EDGAR MILLAR.  
 LORENZO UDOLPHUS C. TITUS.  
 RALPH WINNINGTON KEFER.  
 OLIVER RICHARD MACLEAN.  
 JAMES NORRIS WADDELL.  
 JAMES RYMAL.  
 HENRY RYMERSON HARDY.  
 ROBERT CONNOLLY MILLER.  
 E. SYDNEY SMITH.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
*Treasurer.*

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR FEBRUARY.

1. SUN... *Septuagesima Sunday.*
2. Mon... *Hilary Term begins.*
3. Wed... *New Trial Day, Q. B.*
4. Thurs. *New Trial Day, Q. P.*
5. Fri... *Paper Day, Q. B. New Trial Day, C.P.*
7. Sat... *N. T. Day, Q. B. Paper Day, C.P.*
8. SUN... *Sexagesima Sunday.*
9. Mon... *Paper Day, Q. B. N. T. Day, C.P.*
10. Tues... *N. T. Day, Q. B. Paper Day, C.P. Union of U. & L. Can., 1841.*
11. Wed... *P. D., Q. B. N. T. D., C.P. Last day for set. down & giv. not. of rehearing in Chy.*
12. Thurs. *Open D., Q. B. P.D., C.P. Last day for serving Co. Ct. York.*
13. Fri... *N. T. D., Q. B. Open D., C.P. Spanish Rep. pros. 1873.*
14. Sat... *St. Valentine's. Hill T. ends. Last d. for ret. by Benchers under 35 V. c. 6, s. 7. Last day to give notice for call.*
15. SUN... *Quinquagesima Sunday.*
16. Mon... *Last day to move against election of Mayor, Ald., Reeve, Deputy Reeve, or Local Mun. Councillor (Mun. Act. s. 132.)*
17. Tues... *Shrove Tuesday.*
18. Wed... *Ash Wednesday.*
19. Thurs. *Rehearing term in Chancery begins.*
20. Fri... *Tithes abolished in Upper Canada, 1823.*
22. SUN... *Quadragesima Sunday.*
23. Mon... *Last day to declare for County Court, York.*
24. Tues... *Last d. to move ag't elect'n of Co. Councilor (Mun. Act. s. 132.)*
27. Fri... *Thanksgiving for the recovery of H.R.H. the Prince of Wales, 1873.*
28. Sat... *Last day for ret. by Commissioner of Crown Lands to Co. Treas. under 32 Vic. c. 36, s. 108.*

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## THE

## Canada Law Journal.

Toronto, February, 1874.

Baron Martin retires from the Court of Exchequer in England, after a period of service of twenty-three years. Mr. Amphlett, Q.C., it is said will be his successor.

A case is reported in the *Australian Jurist* where a rule was granted calling on an attorney to answer an affidavit. It appeared that he had acted as a commissioner in taking an affidavit verifying a bill of sale after leaving the district to which his commission was restricted. The court held that it had a summary jurisdiction over the commissioner—that he had been guilty of carelessness and remissness; but, as the applicant did not appear to desire that the court should visit the offence with great severity, it was ordered that the attorney should take down a sign over his office in which he was held out as a commissioner, and should pay the costs of the rule.

The *Solicitors' Journal* notes an interesting case which would have elicited much sympathy from Charles Dickens. It appears that a "highly respectable monthly nurse" was applied to with reference to an event expected to take place in April last, and was requested to hold herself in readiness during that month. She did so, not only during that month, but also during about half of May, but as the expected event did not "transpire," and as the nurse had another engagement of a similar kind, she told her employer that he must not longer depend upon her services. Afterwards upon suing for compensation "for holding herself in readiness," she was nonsuited on the opening address, the judge remarking that as no service was to be proved, there was no case.



## EDITORIAL ITEMS.

Three professional gentlemen have been appointed in England by a committee of Judges to draft rules of procedure under the new Judicature Act: Mr. H. Cadman was selected for his knowledge of Chancery practice; Mr. Arthur Wilson, who holds the office of Tutor in Common Law at the Inner Temple, and Dr. Tristram, (Chancellor of the diocese of London, and of Hereford,) of great experience in the Admiralty, Probate, and Divorce Courts. The work of these gentlemen will be more difficult to accomplish than the framing of the Act itself, and upon their success depends in great measure the efficiency of the reform intended by that statute. The *Solicitors' Journal* expresses a wish that "the whole library of Acts" relating to Common Law and Equity Procedure, repealed by the Judicature Act, may be grouped in some neat repealing schedule, and that in fact the whole body of statutory procedure may in some early session be, to use the words of consolidatory statutes, "reduced into one Act."

We alluded last month to the nomination of a Chief Justice for the Supreme Court of the United States. The President has at length hit upon a man who is not sufficiently obnoxious as to be refused by the Senate. The name of Mr. Williams had to be withdrawn after a deal of abuse had been showered upon him, and apparently not without some show of reason; at least he was not such as Caesar desired his wife might be. The President then, with a singular appreciation of the eternal fitness of things, nominated the notorious Caleb Cushing, the servile tool of the American Government at the Geneva Arbitration and the slanderer of the Chief Justice of England. Even leading papers in the interest of the present administration at Washington, denounced the nomination of this Anglo-phobist, saying that "a great danger

would menace the nation and a lasting disgrace be attached to President Grant's second term of office." We are inclined to agree with that opinion. A third time the President tried his hand, and nominated Mr. Morrison R. Waite, of Ohio, a respectable constitutional lawyer, not, it is said, altogether unfit for the position, but, as we gather from our legal exchanges, with about the same qualifications as some thousands of his brethern in that country.

We have repudiated the wig which is an inseparable ornament of justice in the mother country. Can it be that the white-tie is in danger? We are apprised of two cases in which counsel ventured on the revolutionary proceeding of addressing the court without assuming the white-tie. The court very properly intimated that, although, by the exercise of faculties it had in common with ordinary mortals, it was aware of an individual addressing remarks in its direction, in its judicial capacity it was unable to see or hear anything. The coloured tie had to all intents the same effect as those magic garments which were so conveniently common in the Arabian Nights entertainments.

One offence was aggravated by the circumstance that the learned counsel, instead of displaying the shirt-front of unsullied whiteness, fit emblem of the breast it covers, which the advocate is expected to sport, mounted the unorthodox tie upon a shirt of the material and hue affected by the Nevada fireman. We do not know if the excuse pleaded for this eccentricity was similar to that of Curran, when arraigned before the authorities of his college for wearing a dirty shirt. "I pleaded inability to wear a clean one; and I told them the story of poor Lord Avonmore, who was at that time the plain, untitled, struggling Barry Yelverton. 'I wish, mother,' said Barry, 'I had eleven shirts.' 'Eleven,' Barry!—'why eleven?'

## LAW SOCIETY.

'Because, mother, I am of the opinion that a gentleman, to be comfortable, ought to have *the dozen*.' Poor Barry had but one, and I made the precedent my justification." But in the days of "dickeys" and paper shirt-fronts such a plea would be held demurrable.

*Dignus vindice nodus*—'the tie is worthy of a champion,' and we shall always be found boldly advocating its retention. We are glad to see the bench take so firm a stand against innovation in this respect. Once allow the white-tie to be abolished, and we dare not prophesy what will follow.

'Twill be recorded for a precedent,  
And many an error, by the same example,  
Will rush into the state.

This should not be the least sacred of the ties we venerate.

## LAW SOCIETY.

## MICHAELMAS TERM—37 Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:—

*Monday, November 18th, 1873.*

The several gentlemen whose names are published in the usual lists were called to the Bar, received certificates of fitness, and were admitted as Students of the Laws.

On the petitions of Messrs. Fuller and Pollard, for call to the Bar without examination under special Acts of Parliament:—Ordered, that the ordinary examinations prescribed for call to the Bar be passed in all cases when official Acts of the Legislature are obtained for such call, with clauses requiring examinations by this society.

The petition of Mr. Clendenan, for allowance of second Intermediate Examination within nine months of the first:—Ordered to stand over as premature.

*Tuesday, November 18th.*

The Treasurer announced the result of the Intermediate Examinations.

The abstract of balance sheet was laid on the table.

The petition of A. D. Patterson, for allowance of filing of articles *nunc pro tunc*, granted.

The Report of the Examining Committee was received and adopted.

The Rules and Orders of the Law Society, as reported by Special Committee, were finally adopted.

Mr. G. M. Evans, was appointed Examiner for next Term.

The Committee appointed to examine Journals, reported that Messrs. S. B. Freeman, Q.C., and E. B. Wood, Q.C., had failed to attend any meeting of Convocation for three consecutive Terms:—Ordered that the Secretary do notify Messrs. Freeman and Wood that they had ceased to be Benchers, in consequence of such non-attendance.

Call of the Bench ordered, for the election of Benchers in the place of Messrs. Freeman and Wood.

*Friday, November 21st, 1873.*

On petition of J. C. Cooper for increase of salary: ordered that the salary of Mr. Cooper, for the future, be two hundred and fifty dollars per annum.

On the petitions of several students for the allowance of time under articles:—Ordered that such petitions be not received in any case where time of service has not expired.

A Committee was appointed to examine and consolidate the statutes relating to the Law Society.

*November 27th and 28th.*

The Scholarship Examinations were proceeded with.

*Friday, December 5th.*

A letter from Mr. Robert Campbell, of Whitby, in which he asks to be relieved from his bond as surety for James Keith

## LAW SOCIETY—LAW SCHOOL—COURT OF APPEALS IN QUEBEC.

Gordon, was received and read:—Ordered that he be relieved, upon Mr. Gordon giving another surety.

A letter from Mr. Martin, suggesting the supply of the Statutes to the profession through the Law Society, was received and read:—Ordered that Mr. Martin be informed that Convocation do not consider it advisable to enter into such an engagement as would be necessary to carry out his suggestion.

Draft deed from Law Society to the Crown, of a portion of the Osgoode Hall property, considered.

Report from Library Committee received and adopted, and a grant of \$800 ordered, as suggested by Committee.

Ordered that the Rules and Statutes be published as soon as they are finally examined and approved by the Treasurer.

*Tuesday, December 30th.*

Petition of Mr. Vidal, in relation to his Act of Parliament, granted.

Ordered that the Treasurer, and Messrs. Patterson and Vankoughnet, be a Committee to carry out the transfer of a portion of the Osgoode Hall property to the Government.

J. HILLYARD CAMERON,  
*Treasurer.*

HILARY TERM, 1874.

## CALLS TO THE BAR.

The following gentlemen have passed the examination for call to the bar;—W. D. Hogg, Perth, (without an oral); Elihu Burritt Edwards, Peterborough; James H. Bell, Milton; W. Macdonell, Lindsay; H. A. Reesor, Markham; C. E. Barber, Simcoe; E. H. D. Hall, Peterborough; R. H. Dennistown, Peterborough; Kenneth McLean, Guelph; J. H. Metcalf, Melville; E. Meek, Hamilton, and Albert E. Richards, Toronto.

## ATTORNEYS ADMITTED.

The following gentlemen have passed as Attorneys:—W. D. Hogg, H. A.

Reesor, W. J. Murdock, London; J. H. Bell, E. B. Edwards, W. Macdonell, A. E. Richards, F. D. Moore, Peterborough; E. Meek, and A. McKinnon, Belleville; G. M. Roger, Peterborough; M. A. Ball, St. Catharines; John McGregor, Toronto.

## INTERMEDIATE EXAMINATIONS.

The following have passed the second Intermediate Examination:—A. Ferguson, G. A. Radenhurst, J. H. Thom, E. D. Armour, Hugh O'Leary, James Pearson, D. A. O'Sullivan, C. J. Snider, Stewart Tupper and H. A. E. Kent, (without an oral.) E. T. Malone, T. S. Wade, D. Ormiston, A. R. Lewis, Francis Love, W. R. Burnham and C. S. Jones, (after oral.)

The following have passed the first Intermediate Examination:—J. W. Gordon, R. Pearson, W. M. Hall, W. C. Mahaffey and D. W. Clendenan, (without an oral.) W. R. Dougherty, Geo. Robb, Geo. A. Cook, A. C. Galt, John Crerar, G. S. Goodeave and W. C. Moscrip, (after oral.)

## LAW SCHOOL.

The following gentlemen have passed, and those in the Senior Class have had their period of service shortened as below:—

*Senior Class.*—E. H. D. Hall, twelve months; K. McLean, twelve months; D. Watt, G. B. Gordon and J. Parks, six months.

*Junior Class.*—J. Bruce, R. H. Evans, J. D. Lawson and Alexander Ferguson.

## THE COURT OF APPEALS IN QUEBEC.

There is no cause to despair of the future of any country so long as it possesses an upright, learned and industrious Bench of Judges, and a Bar composed of men having the same requisites, and who have, in addition, a distinct appreciation of their position as bound to assist and not mislead the Bench, and tenacious

## COURT OF APPEALS IN QUEBEC—ACT FOR QUIETING TITLES TO REAL ESTATE.

withal of the rights of the clients they represent.

That the Bench and Bar of our sister Province of Quebec is not all that could be desired has been evident for some years past; but there are not wanting members of the Bar in that Province who not only deplore the existing state of things, but are determined if possible to apply a remedy.

We published some time ago an able article from the *Revue Critique* on this subject, written by Mr. W. H. Kerr. The dissatisfaction has now culminated in a series of resolutions which were passed by a large number of the Bar, and presented to the Court of Appeals at a recent sitting.

We desire to say but little on such a painful subject, especially as there is every reason to hope that a better state of things will shortly prevail. The burden of the charges against the Court of Appeals is, the accumulation of arrears of business, resulting in a practical denial of justice, and a want on the part of some of the Judges of attention to arguments presented by Counsel, and a general carelessness in their adjudications; and, with respect to one of their members, a suspicion that he sometimes gives undue and improper weight to the representations of some lawyers who are said to be favoured above their fellows. This, the most serious charge of all, and which is said to point to Mr. Justice Monk, demands instant investigation. We trust it may prove unfounded. It is also asserted that, in general, the Montreal Judges favour lawyers in the Montreal District, and that the Quebec Judges are partial to the Bar of the District of Quebec. Chief Justice Duval, it is alleged, is not equal to his position owing to ill health, physical weakness, and the want of other attributes essential to the success of the Chief of a Court. Judge Badgley, a most able jurist, and as a man highly respected,

is afflicted with deafness to such an extent that his usefulness is much impaired. We believe that no sort of censure was intended by these resolutions to the two Judges recently appointed, Mr. Justice Taschereau and Mr. Justice Ramsay.

The whole matter will doubtless receive the attention of the Government of the Dominion at an early day, and the less said about it in the meantime the better.

The resolutions are as follows:

*Resolved*,—That the administration of justice in the Court of Queen's Bench has been, for some time past, inefficient, unsatisfactory, and destructive of the confidence which should be reposed in the highest Court of the Province; and that, in the interests of justice, an immediate inquiry by Royal Commission into the causes of such a lamentable state of affairs is imperatively required.

*Resolved*,—That in view of the foregoing resolution, the Bar of this section abstain from pleading before the Court of Queen's Bench during the present term, and that the Chairman of this meeting do communicate this and the foregoing resolution to the said honourable Court.

#### PROCEDURE UNDER THE ACT FOR QUIETING TITLES TO REAL ESTATE.

Under the general orders of the Court of Chancery, the task of investigating titles under the Quieting Titles Act has been committed to several of the Local Masters in Chancery, but all titles so investigated have also to be further inspected by the Referee in Chambers, as Inspector of Titles, before being finally submitted to a judge. We believe that in the past there has been considerable diversity of practice amongst the local Masters, and that in many cases unexpected delays have been occasioned by reason of the Inspector rejecting titles which have been passed by the local Masters, in consequence of the existence of formal defects and objections to the proof which might have been supplied in the first instance had the practice under the Act been well

## PROCEDURE UNDER THE ACT FOR QUIETING TITLES TO REAL ESTATE.

settled and understood. We have, with a view to securing uniformity of procedure under the Act, been at some pains to ascertain the practice followed in the office of the Inspector in Toronto, and have embodied the result of our labours in the following notes, which we believe will be found useful to the profession:—

1. The forms of petition, affidavits and certificates given in the last edition of Taylor on Titles, must be followed in all cases, as nearly as may be. (Paragraph 10, however, of petitioner's Affidavit seems no longer necessary: see 36 Vict. c. 44 s. 69, Ont.)

2. All material facts necessary to be proved to make out a petitioner's title should, where possible, be proved or corroborated by the oath of witnesses independent of the petitioner.

3. Wherever the title sought to be quieted is subject to a mortgage, the mortgage or certified copy must be produced, and the mortgagee must be notified under the Act, unless his consent to the granting of the certificate to the petitioner, subject to the mortgage, be filed. So also, where the title is subject to a contract for sale, the contract or a certified copy must be produced, and the vendee notified, or his consent filed.

4. Where the petitioner's title is acquired by possession, as a general rule the person entitled under the paper title should be served with notice under the Act.

5. A petitioner claiming by possession should be prepared to show the state of the land at the time his possession commenced: (e.g., whether it was in a state of nature, or under cultivation;) also, that his possession has been continuous; also, that it has extended over the whole of the land claimed in the petition. He should also negative, as far as possible, the existence of any facts which under the statute of limitations would preserve the paper title, notwithstanding the possession: (e.g., he should show that

the person entitled under the paper title was *sui juris* and under no disability at the time the possession under which the petitioner claims commenced; and that no acknowledgment of title has been given, etc.)

6. The Sheriff's certificate should include the names of all persons who in 1863 or subsequently thereto owned the lands in question; (see *Neilson v. Jarvis* 13 C.P. 176; 27 Vict. cap. 13, sec. 2; and *Miller v. Beaver Mutual &c.*, 14 C.P. 399) and where any of the owners have died, the names of their executors or administrators should also be included in the certificate.

7. Where the petitioner claims under a deed which has been lost, the grantor in the lost deed or his representative must in general be served with notice under the Act.

8. The Registrar must certify that he has extracted *all registrations* affecting the lands in question, unless some special reason can be shown for a departure from this rule.

9. Whenever an adverse claim is filed, the Referee to whom the petition is referred should make a report and order thereon, allowing or disallowing it, as the case may be, and awarding the costs occasioned by the claim as he may think proper. (The practice of the Master's office as to settling and signing reports should be followed.) This report and order must be filed in the office of the Clerk of Records and Writs, and be confirmed before any final adjudication can be made in the matter of the petition.

10. Petitions under the Act will not be entertained where the petitioner is not in the actual possession of the land by himself, or his tenants. And where he claims to be in possession by his tenant, the lease, if any, under which such tenant holds, must be produced, and the consent of the tenant to the granting of a certificate must be filed, or he must be notified under the Act.

## NEW TARIFF FOR COUNTY COURTS.

11. In all cases it is necessary to prove who is in the *actual occupation* of the lands in question.

12. Whenever a notice is required to be served on any person appearing to have any adverse interest, it is advisable that the reason of the notice being served should be stated: (*e.g.*, where the notice is required to be served on a person appearing to have a claim for dower, the notice should state "this notice is served upon you because it appears from the evidence adduced before me that you may have some claim or right to dower in the said premises, and because the petitioner claims to be entitled thereto free from any such claim or right.")

## NEW TARIFF FOR COUNTY COURTS.

We are happy to be able to inform the profession that a new tariff in County Court cases has been framed by the Judges of the Superior Courts of Common Law, at Toronto, and his Honor Judge Gowan, associated with them under the Act in that behalf. By the new tariff the fees allowed to counsel and attorneys will be somewhat more commensurate to the work done than were the fees under the old table of costs. The work in a County Court case is very frequently as troublesome and difficult as in contested cases in the Superior Courts, and it has long been felt that the fees allowed under the existing tariff were quite inadequate to the work and labor often necessary in such cases. An examination of the new tariff would seem to show that whilst the fees mentioned therein are certainly not more than the labor calls for, they will in contested cases be considerably increased; in ordinary suits there will be an increase, but not much.

The new tariff will come into force from and after the first day of March next (1874).

In order that the profession may have

some idea of the nature of the proposed change, and of the increase likely to be made by the new tariff, we will mention a few of the fees, comparing them with the fees allowed under the existing table of costs.

The first item of a suit, namely, instructions to sue or defend, has been doubled—\$2 under new tariff, only \$1 under the old. This item, of course, occurs in every suit, whether contested or not, but only once. Common declaration under the new tariff is \$1, and each copy 75c., and both attendance to file and serve is allowed—under the old tariff \$1.25 was allowed for declaration, but only one copy was allowed and only one attendance, either to file or serve, so that there is an increase here of 75c. An important item occurring in every contested suit, and not allowed by the existing tariff, is given by the new tariff, namely, Instructions for pleading, \$1. For several attendances that are in a measure special, the fees are doubled, such as attendance at Judge's Chambers, 50c.; Attorney attending Court, \$1; attending Clerk to ascertain amount due by a British subject under order of a Judge, \$1; taxation of costs on *postea* fee doubled, \$1. Several very necessary fees are also allowed to counsel by the new tariff, which have not been taxable hitherto, such as revising pleas, not more than \$2; advising on evidence, not more than \$3. In the matter of counsel fees at trial, the power of the Judge and Clerk has very properly been extended. Cases in the County Court not unfrequently last two or three days, and the fees hitherto have been very inadequate. We think the power of the Judge might have been extended even further than by the new tariff; under it, however, the Clerk may tax up to \$10, and by order of the Judge up to \$20. It will be seen that the increase does not touch the ordinary small matters in a suit; for example, the present absurdly

## NEW TARIFF FOR COUNTY COURTS—A LEGAL CURIOSITY.

low fee of 25c. for each letter and ordinary attendance is not increased, so that, as we have stated, there will be only a slight addition to the fees in uncontested cases.

We are bound to confess that although the increase in the three tariffs (Superior Courts of law, Chancery and County Court,) has been a step in the right direction, they are not at all commensurate with the decreased purchasing value of money since these tariffs were first framed. The same remarks are also applicable to the salaries of the Judges. We have frequently urged an increase to the latter, though with professional modesty saying but little as to the former. We are, however, inclined to think that an increase of salaries to the Judges would be a natural sequence of largely increased fees to the profession. The latter matter is in the hands of the Judges, and they may possibly hesitate to give that to the profession which would have the effect, indirectly, of increasing their own emoluments.

The most important changes are in the fees allowed to the officials of the court. The Clerk is now to receive about one-third more than the old fees for most of the services performed by him; entering the writ now being 40c., entering appearance 15c., and filings 10c., with the other charges in proportion. The Sheriff, too, will rejoice over increased fees, while even the Crier is not neglected. We may add that an additional 25c. per day is allowed to ordinary witnesses, which seems only reasonable.

One unpleasant result of the new tariff will be, that whilst suitors will complain of increased bills, the profession will not in the majority of cases be much the richer thereby.

Now that the Judges are reforming the tariffs, it is to be hoped they will take in hand that of the Surrogate Courts, which

sadly needs it. A more absurd one could not well be conceived. One result of it is, that much of the work which properly belongs to the profession is thrown into the hands of the Clerks, whose fees are already sufficiently large. Another is, that from want of a tariff worthy the name, it is given the go-by altogether, and often exorbitant charges are made. The tariff for the Clerks, moreover, is so loosely drawn that they often charge fees which under no reasonable reading are they entitled to.

## A LEGAL CURIOSITY.

THE MS. OF SIR FRANCIS MOORE'S REPORTS  
IN CANADA.

The publication of "The Reporters and Text writers" in our columns has brought out the fact that in Canada we have a most interesting relique of legal antiquity.

Sir Francis Moore's reports are described in "The Reporters and Text writers" as "a collection of law cases, printed in 1663 from the original in French, then in the hands of Sir Geoffrey Palmer, Attorney-General to Charles the Second, &c."

Mr. Wallace in his work on the Reporters says, "Sir Francis Moore was one of the most eminent lawyers of his time, and his reports being from a genuine MS. have always enjoyed a reputation for accuracy." Sir Geoffrey Palmer, who first printed them, was the son-in-law of Sir Francis Moore. The reports were printed with the recorded assent of Sir Matthew Hale, who married a grand-daughter of Sir Francis.

The original MS. in French is now in a private library in Toronto.

On a fly page of it is the following venerable memo:—"This Booke was given mee by Mr. Garton, a Barrester of the Temple, 3rd January, 1635. Jo. Finch." We know nothing of Mr. Garton. So far as we are informed, history has failed to embalm his memory. But Sir John Finch was in 1635 Chief Justice of the Com-

## A LEGAL CURIOSITY—THE OFFICE OF CORONER.

mon Pleas, and in 1640 was made Lord Keeper with a Peerage.

This remarkable volume is described by the author of "The Reporters and Text writers" as *lately* in the library of Arthur E., of Anglesey, (Athens Oxonienses, vol. ii. p. 305). It may now be described as at present in the library of "R. A. Harrison, Q.C., of Toronto, Canada."

We are informed Mr. Harrison will be only too happy to show the volume to any gentleman sufficiently interested in legal antiquity to make application for an inspection of it. He secured the volume through a correspondent in London, and has had it for several years. It is bound in vellum and well preserved.

## SELECTIONS.

## THE OFFICE OF CORONER.

"The laws of God and man both give the party an opportunity to make his defence if he has any," saith Fortescue, J.; whereupon, "the good old judge"—as Wynne calls him in his *Eunomus*—quaintly adds, "I remember to have heard it observed by a very learned man that, even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." And Lord Coke gravely deprecates the non-observance of this fundamental principle by the learned person who, presiding in the nether tribunal, apparently finds "natural justice a term as difficult of application as even that of the Ulster tenant-right custom" (*per Morris, J., Friel v. Earl of Leitrim*, 7 Ir. L. T. R. 6); for "the poet (Virgil: *Æneid*, vi. 566), in describing the iniquity of Radamanthus, that cruell judge of Hell, saith,

*"Castigatque, auditque dolos, subigitque fateri."*

First, he punished before he heard; and, when he had heard his denial, he compelled the party accused, by torture, to confess it. But far otherwise doth Almighty God proceed, *postquam reus*

*diffamatus est*,—1. Vocat, 2. Interrogat, 3. Judicat." Nor are modern *dicta* wanting. "The maxim 'Audi alteram partem' is not a mere technical rule of English law," observes Pigot, C.B.; "its foundation is laid in the general principles of all jurisprudence that deserves the name." And Erie, C.J.: "I find the master minds of every century are consentaneous in holding it to be an indispensable requirement of justice, that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him"—except, adds the irate reporter, *in notis*, in the case of a Coroner's inquest, "a barbarism which the enlightenment of the 19th century has hitherto failed to put to shame."

The office of Coroner is certainly of very ancient origin. In 3 Bulst. 176, Doddridge, J., says the commencement of it is not well known. We believe it may be traced to the time of Alfred. And, perhaps, it may have been still suited for the state of society three centuries ago. But to-day, mediæval institutions must show cause; it suffices not to say that they survive—we must see the necessity. It suffices not, now-a-days, to say—

"The laws for thy great grandsire made  
Are laws to thee—must be obeyed—  
Must be obeyed, and why? Because,  
Bad though they be, they are the laws."

—GORTON.

And, if "of the rights by nature taught, and born with man, they take no thought," their tenure of existence is not likely to be very prolonged. We, therefore, regard as a matter of vital consequence affecting the very existence in time to come of the office of Coroner, an order now issued, as it appears, by the Executive, that, in future, prisoners arrested for murder or manslaughter are not to be brought before the Coroner at the inquest; for, if the accused is no longer to be afforded an opportunity of hearing the evidence against him, and of offering evidence in his favour, the "Crown's 'quest'" must fail in the first principles of justice, and lose the last vestige of excuse for the continued exercise of an immemorial function. For that it is the function of the Coroner to inquire, "who were and in what manner culpable," is so perfectly assured that we shall simply take it for granted, without entering into any disquisition on the statute of Edward the Fourth, which



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merely copied the exposition of Bracton as to the Coroner's jurisdiction, and declares the law as it is also stated in Britton (cap. 1, ss. 5, 13), &c., and as it has been ever accepted in practice—and, we may add that, in the words of Wightman, J., when discussing the extent of the Coroner's authority, "The best guide to the discovery of the duties of an ancient office is custom." It is quite another matter whether the Coroner's office, in other respects of the highest utility, may not in this particular respect require some degree of reconsideration; but, if so, there is a constitutional mode of dealing with the question, and of abrogating the impeached function altogether. If a function is no longer of public utility, it surely does not mend matters to permit the function still to be exercised, but to render its exercise so obnoxious and the consequences of its exercise so invidious that, in the course of time, it may come to be abated as a common nuisance. It may be that, as the constable permits a delinquent to proceed until he commits himself beyond yea or nay, so, the Coroner is to be allowed to indulge in the exercise of his duties under watchful police supervision, until the time comes for direct intervention in order to supersede the office of Coroner altogether. But, if the office is to be superseded (we trust that it will not), is this, too, only to be accomplished by waging a long conflict of authority with officers who are endeavouring to perform, to the best of their ability, an onerous, delicate, and ill-paid public service? Already, the feud has made some progress; and, while Coroners are still to be guided by instructions laid down for them, that the depositions in writing are to be taken in the presence of the accused, the magistrates refuse to give orders (according to the practice heretofore prevailing in this country) to bring the prisoners before the Coroners—guided herein by the law officers of the Crown, and disregarding a hint to be found by referring to the index of the "Land-owners' Guide" (De Moleyns), 6th ed., under the heading "Adviser, Law—advice to magistrates to avoid him."

The question involved arose in Ireland in the case of the murder of head-constable Talbot, in which case the Coroner's verdict was found in the absence of the prisoner; in the case of the Hollywood

murder, in which a writ of *habeas corpus* had to be issued, before the prisoners Charlotte and Mary Rea were produced at the Coroner's inquest; and it has now, again, arisen in two cases, one of them in Cork, in which a man named Connell has been charged with causing the death of a child named Julia Leary, and the other case in Dublin, in which a man named Reardon has been charged with causing the death of the girl Kate Pyne, and in which a *habeas corpus* has also been issued. In England, the question arose many years ago, in a case which occurred in London, in which it may be remembered the late Coroner Wakley took a prominent part. Subsequently, in 1868, a similar conflict arose between the Coroner for central Middlesex, Dr. Lankester, and the Secretary of State, who then wrote as follows:—"It appears that in cases of this kind the Coroner makes an application to the Secretary of State, to authorize the person charged to be brought before the inquest (which is always fixed for the day on which the prisoner is to be taken before the police magistrate for further examination), on his way to or from the Police Court. Seeing, however, that the Secretary of State has no legal authority to give any such orders, and that he, therefore, in every such case, steps beyond the law, he is of opinion that the practice in question, which exists only in the metropolitan police district, cannot properly be continued." And again, on the occasion of the Clerkenwell outrage, when the jury at the inquest (Dr. Lankester, Coroner) required that the accused should be present, the Home Secretary refused, thinking that there would be danger of a rescue. But, we may add that, in England there is a special reason why prisoners should not be sent to trial upon a Coroner's warrant without investigation before the magistrates, as, in such case, the provisions of 30 & 31 Vict., c. 35, ss. 3, 5, do not apply, enabling the expenses of witnesses for the defence in criminal prosecutions to be paid—a statute the beneficial operation of which ought certainly to be extended to Ireland, and also to the case of witnesses for prisoners committed on Coroner's warrants.

To us it appears that, in all cases, the person implicated or accused at a Coroner's inquest ought to be present, so

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long as the inquiry is permitted to embrace, not merely the question of the cause of death, but the question of the guilt or innocence of the person causing death; while, on the other hand, we are inclined to think that the Coroner's jurisdiction needs reform, and that the question upon every inquest should merely be, Whether the death was occasioned by violence or by natural causes? The present state of the law is certainly anomalous and unsatisfactory, whether the jurisdiction to be exercised be the limited one suggested, or the more enlarged one actually existing; and, in any case, therefore, we hold that a reform is needed. An inquest may proceed for a considerable time without its appearing directly that any person is implicated; then a person appears to be implicated, but there is no specific charge—it may be murder, it may be manslaughter, it may be what you please or nothing at all. If the person implicated appears, he has, nevertheless, no legal right to insist on being heard by counsel or solicitor—he does not appear as a defendant, for there is no defendant at an inquest, nor as a witness, for that would be to compel him to convict himself—he has no legal right to be heard in self-defence, for he is not legally charged with crime, nor has he a legal right to copies of the depositions made. If he does not appear, and a finding be taken that he fled for the offence—*fugam fecit*, as it is called—it seems that the finding is conclusive against him, and not traversable, “quia c'est un surséant positif ley del corone.” Whether he appears or not, it is the duty of the Coroner to bind over only those witnesses who prove any material fact against him, and not those who are called for the purpose of exculpating him; and, unlike the depositions of witnesses before the Grand Jury, the depositions at the Coroner's inquest of witnesses, who may die before the trial of the indictment, may be read against him. Upon this preliminary inquiry, which may or may not lead to an accusation—upon the evidence of witnesses who are not subjected to the rules of legal testimony—upon the verdict of a jury, or of the majority of a jury who, unlike the grand jury, although the inquiry be *ex-parte*, are not sworn to secrecy—and, upon the charge of a judge who is commonly not a lawyer, nor gifted

with the “judicial mind” which, unless in rare instances, only a lengthened legal training and experience develop—the person inculpated by the finding of the “Crown's quest” may be committed for trial, and convicted, or he may be outlawed and his goods forfeited. Nor do we think that the Court of Queen's Bench ever took upon itself to quash such an inquisition for the improper reception of evidence, or as being against evidence, nor would it be any reason for quashing it that the law had been improperly laid down. It really adds but little to these anomalies that the Coroner may, in his discretion, hold the inquiry in private, or exclude the person chiefly interested from Court, or that, as we now find, his presence may be directly impeded by the law officers of the Crown. And what, after all, is gained by this process? Even if there be an acquittal on the inquest, the accused, when committed by the magistrates, will not be released. A conviction for murder or manslaughter on a coroner's inquisition, without an indictment found by the grand jury, “the Grand Inquest,” although there may have been a rare instance to the contrary, is virtually unknown in practice; if the magistrates have refused to send the case for trial, or the grand jury throws out the bill, an acquittal is almost invariably taken upon the inquisition, and, if the magistrate commits for trial, the trial is always upon the magistrate's committal, and not on the coroner's inquisition. Time and money are wasted, continual conflicts of jurisdiction are occasioned, and the interests of justice are in no way promoted. We must not be unreasonably attached to old institutions merely because they are old; the wisdom of our ancestors, too, thought fit to restrict the functions of the Coroner's office, for by Magna Charta it is declared that “no sheriff, constable, escheator, coroner, nor any other of our bailiffs, shall hold pleas of our Crown.” And, even as they have been inhibited, of old, from holding pleas in which there is both accusation and answer by the accused, so now, it may well be that to those whose special duty it is to inquire into charges of violence, the exercise of this duty should be limited, based as it ever should be upon a distinct and specific charge, within a prescribed jurisdiction, and associated with all the formalities of

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strict law and the full powers of defence. By reforming the office of Coroner, and abridging its functions so that the inquest may be merely as to the identity of the deceased, and as to the cause of death,—a proceeding more strictly for information and not for accusation—much of that unseemliness and coarseness of demeanour which has so greatly tended to bring the "Crown's 'quest'" into disrepute, will be avoided, by the removal of the occasion of factious and personal disquietude; and the appointment of medical men to the office will be better justified, when medical and physiological questions alone have to be determined, taking the dead body and the symptoms it exhibits as a main part of the evidence, to be commented upon (as we hold that it should) by the Coroner from his own observation. There would no longer, then, be a reason for insistence on the presence of the person who may have caused the death, and the proceeding would be properly ex-parte to all intents and purposes. One effect of this would be, that the publication of such ex-parte proceedings, if affecting another whose conduct would remain to be considered by another tribunal, would be properly considered, in the words of Bayley, J., "a matter of great criminality." And, indeed, an enforced reticence in such cases, as well as the absence of the incriminated person himself, might often be productive of the best results; for, in the words of Lord Tenterden, "it may be requisite that a suspected person should not, in so early a stage, be informed of the suspicion against him, and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise."—*Fish Law Times*.

#### TERMINATION OF COMMON CARRIER'S RESPONSIBILITY AS INSURER.

It is a general principle that the liability of a common carrier of goods continues as insurer until a *reasonable time* after the arrival of the vehicle of transportation at its destination. And this principle is applicable without regard to the nature of the goods or the character of the vehicle, and whether the carriage be by water or by land. But in determining this *reasonable time* during which the

responsibility as carrier continues there has been much difficulty and disagreement. The question has usually been reserved by the court as purely one of law, or submitted to the jury under the strictest directions.

One class of cases confines the period of responsibility as carrier, after arrival of vehicle, to the narrowest limits, and holds that a removal of the goods from the vessel or the car upon a wharf or platform, or into a freight-house, discharges the carrier from all responsibility as such, and transforms the liability into that of warehouseman: *Norway Plains Co. v. Boston & Maine R. R., Co.* 1 Gray, 263; *Sessions v. Western R. R. Co.*, 16 id. 132; *Rice v. Boston & Worcester R. R. Co.*, 98 Mass. 212; *Shepherd v. Bristol & Exeter R. R.*, Law Rep., 3 Exch. 189. These cases are decided solely with reference to the carrier's convenience, and while reducing the time after arrival to a *minimum*, and the specific acts of the carrier to the least possible, before the liability as carrier ceases, they do not take into account the convenience or reasonable expectations of the consignee. That able jurist Chief Justice Shaw, of the Supreme Court of Massachusetts, in *Norway Plains Co. v. Railroad Co.*, *supra*, thus presented this view of the subject: "This view of the law applicable to railroad companies as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed upon the platform; that if on account of their arrival in the night, or at any other time when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot be delivered, or if, for any reason, the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered and actually deliver them when duly called for by parties authorised and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire."

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There is another class of cases which deems the liability of the carrier, as such, to continue until the consignee has notice and reasonable time for removal, whether the goods remain in the vehicle of transportation or have been stored in a warehouse: *Moses v. Boston & Maine Railway Co.*, 22 N. H. 523; *Shenk v. Philadelphia Steam Propeller*, 60 Pa. St. 109; *Redmond v. Liverpool, New York & Philadelphia Steamboat Co.*, 46 N. Y. 578 (to appear in 7 Am. Rep.); *Blumenthal v. Brainerd*, 38 Vt. 402; *Winslow v. Vermont & Massachusetts R. R. Co.*, 42 id. 900 (1 Am. Rep. 365); *Hill Manufacturing Co. v. R. R. Co.*, 6 Am. Rep. 202 (104 Mass. 122); *Graves v. Hartford and New York Steamboat Co.*, 12 Am. Law Reg. N. S. 23 (to appear in 39 Conn. Rep.). This flexible rule seems to be that most generally adopted in this country, according to the later cases. In *Graves v. Steamboat Co.*, *supra*, Seymour, J., makes the following pertinent suggestions in support of this rule: "Whatever reasons there are for imposing a strict rule of responsibility during the transit, exist and continue in full force until the consignee has reasonable time to take the goods into his own care and custody. The rule adopted in Massachusetts has the merit of being definite and of easy application, and may in many cases avoid a painful controversy as to what, under the circumstances, is a reasonable time within which the consignee must appear and take the goods. But, on the other hand, that rule puts an end to the carrier's responsibility as such, just where that responsibility is of the highest value to the shipper. Between the deposit of the goods on the platform and their delivery to the consignee, they are exposed to theft, depredation and injury by strangers, and by the carrier's employees.

In making delivery care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier upon the full responsibility pertaining to him as such, and he ought not to be allowed to lay aside that responsibility until the owner of the goods has had a fair and reasonable time and opportunity to receive them." Notwithstanding the fact that the rule of liability as insurer, which attaches to the

capacity of a carrier, originated in a period and in a state of society very different from our own, and notwithstanding the evident disposition of the courts to effect a modification of a liability exceedingly strict for modern times and modern commercial institutions, the rule as laid down by Judge Seymour is far preferable, on principle, to that laid down by Chief Justice Shaw. If the liability of the carrier continues at all, after the arrival of the vehicle containing the transported goods, it must continue for a reasonable time after such arrival. None of the cases go so far as to hold that at the moment the vessel or car arrives at its destination the liability as carrier ceases. Goods must at least be taken out of the vessel or car, or delivery must be accepted by the consignee while on board such vessel or car, in order to terminate the liability as carrier, according to the strictest of the cases. And it seems a most arbitrary rule that a removal of the goods from the vehicle of transportation to a platform, wharf, or warehouse should, *per se*, be sufficient to terminate the responsibility as carrier.

A distinction has been suggested between land-borne and water-borne goods, but this seems to be not well founded, and was repudiated in *Graves v. Steamboat Co.*, *supra*, and in *Redmond v. Steamboat Co.*, *supra*. See, also, *Richardson v. Goddard*, 23 How. (U. S.) 28. The effect of custom has, however, been recognized. In *McMaster v. Pennsylvania R. R. Co.*, 23 Phil. 397 (69 Pa. St.), it was held that upon proof of a custom on the part of a railway company to deliver goods at a way station on their platform, without warehousing or giving notice of their arrival to the consignee, such delivery was sufficient, and an exoneration of the carrier from liability for their subsequent loss. See, also, *Farmers' and Mechanics' Bank v. The Champlain Transportation Co.*, 23 Vt. 186. So, also, the positive acts of the consignee may be considered in determining the period when the liability as carrier ceases. In *Fenner v. The Buffalo and State Line R. R. Co.*, 4 Am. Rep. 709 (44 N. Y. 505), it was held that where a common carrier, a railroad company by agreement with the consignee and for mutual convenience, stores goods which have arrived at their destination, in its freight-house for the

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night, and they are destroyed by fire without its fault, the company is not liable.

The liability of the carrier for delivery of through freight to the succeeding carrier has been discussed in several recent cases. In *Lawrence v. Winona and St. Peter R. R. Co.*, 2 Am. Rep. 130 (15 Minn. 390), it was held that while in the absence of a special agreement a carrier is only liable to the extent of his route, and for safe storage and delivery to the next carrier, yet, if he stores the goods in his own warehouse, at the end of his line, without delivery or notice, or attempt to deliver to the next carrier, his liability as carrier continues. In *Mills et al. v. The Michigan Central R. R. Co.*, 6 Am. Rep. 152 (45 N. Y. 622), it was held that where defendant, a carrier of goods destined to a point beyond its line, had transported them to the end of its route, and given the usual notice to the succeeding carrier, a line of vessels, and the goods were destroyed on the evening following their arrival, and while in defendant's possession, although defendant was ready to deliver the goods to the succeeding carrier, yet it was liable, as common carrier, for a reasonable time until, according to the usual course of business, a vessel of the succeeding carrier could arrive to take the goods.

Travellers have a reasonable time to claim and remove their baggage; and what is such reasonable time depends upon the circumstances of each case. After such reasonable time has elapsed the liability as carrier ceases, and that of warehouseman begins: *Mote v. Chicago & Northwestern R. R. Co.*, 1 Am. Rep. 212 (27 Iowa, 22); *Burnell v. N. Y. Central R. R. Co.*, 6 Am. Rep. 61 (48 N. Y. 154). But the baggage must be placed in a secure warehouse to exonerate the company from liability as carrier. *Bartholomew v. St. Louis and E. R. R. Co.*, 5 Am. Rep. 45 (53 Ill. 227); *Chicago & C. R. R. Co. v. Fairclough*, 52 Ill. 106. In *Burnell v. R. R. Co.*, *supra*, plaintiff called for his baggage on the second day after its arrival, and the New York court of appeals held that the liability of the company as carriers had ceased, and the liability of warehouseman had begun. Express companies are held to a stricter liability, in respect to delivery, than carriers by vessel or by rail-

way cars. The rule of liability is essentially the same, but in its application a longer time is allowed before the responsibility as insurer ceases; and as express companies are bound to make distribution and delivery at the consignee's place of business or residence, reasonable diligence must be exercised in finding the consignee before the liability as insurer ceases. *Whitbeck v. Holland*, 6 Am. Rep. 23 (45 N. Y. 13). After such diligence in finding the consignee the liability as warehouseman attaches, and that of carrier ceases. *Weed v. Barney*, 6 Am. Rep. 96 (45 N. Y. 344).—*Albany Law Journal*.

## CANADA REPORTS.

## ONTARIO.

## NOTES OF RECENT DECISIONS.

## COMMON PLEAS.

## FALLE V. THE CORPORATION OF THE TOWN OF TILSONBURG.

*Streets in Town—Jurisdiction over to close up—Mun. Act, sec. 320—Construction of.*

The Corporation of the Town of Tilsonburg passed a By-law to close up 250 feet of a street within its limits, called Cranberry street, substituting therefor New street; the street forming part of a road running through different townships in the county into the Town.

*Held*, that the county had not sole jurisdiction over the whole road; but that the Town had jurisdiction over the part within its limits, and therefore had power to close it up.

*Held*, also, that sec. 320 of the Mun. Act does not apply to persons whose lands do not abut on the portion of the road closed up, although they may have lands on another part of it.

## PUERTELL V. BOILAN.

*Ejectment—Former recovery—Estoppel.*

In ejectment plaintiff claimed under a mortgage made by defendant, and defendant under a deed from the plaintiff—the mortgage having been given to secure part of the purchase money. Defendant proved a judgment in an action of covenant brought by the plaintiff against defendant on this mortgage to recover

the money secured thereby, in which defendant pleaded that the mortgage had been obtained by fraud, and judgment was given in his favor on that issue.

*Held*, that the defendant could not set up the judgment as a defence in this action, not having placed the plaintiff *statu quo* by restoring to him possession of the premises.

*Semble*, that the plaintiff's notice of claim was sufficient, and that, if necessary, an amendment of it could have been allowed.

#### WILLIAMS v. McCOLL.

*Tax sale—29, 30 Vict. c. 53—Certificate—Description of land.*

A certificate given for the portion of a lot sold for taxes on the 12th of Nov., 1867, under 29, 30 Vict. c. 53, stated it to be the 1-27th part, without further describing it. The deed given on the 19th April, 1871 described the land by metes and bounds.

*Held*, that the deed was void.

#### SCOTT v. THE GREAT WESTERN RAILWAY COMPANY.

*G. W. R. W. Co.—31 Vict. c. 68, sec. 20, sub-sec. 4, D.—as amended by 34 Vict. c. 43, sec. 5, 7, D.—Whether applicable to.*

*Held*, that sec. 20, sub-sec. 4 of The Railway Act, 1868, 31 Vict. c. 68, D., as amended by 34 Vict. c. 43, sec. 5, D., is not, by virtue of sec. 7 of the latter Act, made applicable to the G. W. R. W. Co.; and, therefore, that they were not deprived of the protection afforded by one of their special conditions, which stated that fruit was to be carried only at the risk of the owners and that they would not be liable for injury occasioned by frost, although the jury found that the goods became frozen owing to their negligence.

#### CLUXTON v. GILBERT.

*Covenant—Liability on.*

On December 1st, 1864, defendant, being seized in fee of certain land in trust for his son, at the request of the son, mortgaged it to B. & V. for \$400, the son receiving the money and agreeing to pay it off; and on September 21, 1866, the defendant conveyed to his son, the operative word being "grant" only, and the consideration stated being \$400, but in reality it was a gift or release of the father's estate;

the deed also, by inadvertence or mistake, and without any agreement to that effect, contained a covenant for the right to convey, notwithstanding defendant's acts, and also that he had done no act to encumber the land. On the 21st October, 1866, the son mortgaged the land to the plaintiff as collateral security for a then existing debt, for goods supplied to the son, who kept a store, and for any future advances to be made by the plaintiff to him. This mortgage not having been redeemed, was on the 27th April, 1870, foreclosed. At this time there was due on the mortgage to B. & V., for principal and interest, \$606, which the plaintiff, on defendant's refusal to do so, was obliged to pay. It did not appear that the plaintiff had any knowledge of the trust between father and son, or of the arrangements between them as to the mortgage to B. & V., nor had he any knowledge of its existence until after the foreclosure. It appeared, however, that it, together with the other conveyancing, had been duly registered, and that the land was worth both the mortgages.

The plaintiff having brought an action against the defendant, on the defendant's covenant contained in the deed from him to the son, to recover the amount paid to B. & V.,

*Held*, that the plaintiff was not entitled to recover.

#### THE CANADA PERMANENT BUILDING AND SAVING SOCIETY v. AGNEW.

*Sale of land for taxes—Separation of counties—29, 30 Vict. c. 51, sec. 51—32 Vict. c. 36, sec. 132—32 Vict. c. 36, sec. 155—Construction of.*

Where taxes had accrued due on certain lands in the County of Bruce, before the separation of that County from Huron, which took place on the 1st of January, 1867,

*Held*, that the Treasurer of the County of Huron, before the 32 Vict. c. 36, sec. 132, O., could not sell such lands for these taxes.

*Held*, also, that the sale was not made valid by 32 Vict. c. 36, sec. 155, O., as it only applies to deeds given by the Sheriff or Treasurer having authority.

#### COURT OF CHANCERY.

##### GREEN v. CARLY.

*Will—Construction.*

A testator by his will devised the real estate of which he should die possessed to his wife "to hold the same for ever, and to dispose of it in

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any manner she may think proper," and further, "the residue of my estate, both real and personal, I give to my beloved wife to have and to hold the same for her sole use and benefit during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate as she may think proper, and at her death, the said residue of my real estate or personal estate, if any," he gave to other parties.

*Held*, that the widow took an estate for life in the residue of the personal estate, with an absolute power of disposition; but that the deposit in a bank to her own credit of the proceeds of notes and mortgages which the widow had collected, was not such a disposition thereof as to withdraw them from the residue of the estate and give her an absolute title thereto; but that the same remained to be administered as part of the testator's estate.

#### HUGHSON V. COOK.

*Crown lands—Sale of pine timber—Injunction.*

The locatee of Crown lands, located under the authority of the Act of 1868, has no power to sell or dispose of the pine timber growing thereon.

One S. was locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The agent of the plaintiff swore that some pine timber had been taken off these "lots in 1870-71, by some persons getting out square timber," and further that the defendant was the only person getting out square timber that season. After two years, the Court considered this evidence too indefinite as to the locality of cutting, and as to quantity cut; and the act too old in date to warrant the Court in granting an injunction to restrain further cutting.

#### TOWNSHIP OF WEST GWILLIMBURY V. COUNTY OF SIMCOE.

*Railway Bonus—Petition—By-law.*

By the statute incorporating a railway company, it was enacted that if fifty persons, at least, of the qualified ratepayers within the portion of any County affected by the railway, should petition for the passage of a by-law granting aid to the undertaking, the Council should pass such Act, subject to the vote of the qualified ratepayers of such portion of the County.

*Held*, that it was not necessary that the petition should be signed by a portion of the fifty persons from each locality in the portion of the County affected.

In giving notice submitting a by-law, granting aid to a railway company for the approval of the ratepayers, the officers, in giving such notice, had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act.

*Held*, that this formed no ground for quashing the by-law.

A petition to a Municipal Council, prayed for the passage of a by-law, granting aid to a railway company, to be charged on a specified section of the County. In the section so specified were situated two villages, both of which were incorporated, but they were not named in the petition or in the by-law.

*Held*, no objection to the by-law.

#### MEYERS V. MEYERS.

*Judgment Creditors—Registration of judgments.*

While the law respecting the registration of judgments was in force, two judgment creditors having registered their judgments, the second one in point of time proceeded with his suit; the other did not, although his bill was filed in time, and he proved his claim in the Master's office in the other suit.

*Held*, that he had not lost his priority; and that it was unnecessary to revive his suit, which had abated meanwhile by reason of the death of some of the parties.

#### BROWN V. McNAB.

*Municipal Corporations—Mortmain—Rectifying deed—Acquiescence.*

Municipal Corporations are within the Statutes of Mortmain. Where a mortgage on land was executed to a Municipal Corporation for the purpose of securing a debt due to the Corporation by its treasurer, and by the mistake of both parties, the mortgage did not cover a part of the land which it was intended to mortgage, it was *held*, that the Corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled.

Where the owner of property had executed a mortgage and re-lease thereof, to a Municipal Corporation, and the Corporation afterwards sold the property with the knowledge of such owner, and without objection by him until, as was alleged, (though as to this, the affidavits were contradictory), the purchaser had had seven years quiet possession; during which time he had improved the property. The case was held a proper one for granting an injunction to the

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NOTES OF BENCH DECISIONS.

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hearing; restraining an action of ejectment against the purchaser.

**CLINE V. THE MOUNTAIN VIEW CHEESE FACTORY.**

*Demurrer—Injunction—Parties—Pleading.*

A bill was filed against a Joint Stock Company (limited), to restrain the infringement of a patent, to which certain officers of the company were made parties, and the bill alleged that "the defendants" were committing the acts complained of, and prayed relief against "the defendants." A demurrer on the ground that the officers were improperly made parties, was overruled with costs, these officers being personally charged with committing the acts complained of, and relief being prayed against them.

**COTTON V. VANSITTART.**

*Fraudulent Assignment—Life policy.*

A person in embarrassed circumstances, proposed to assign a policy on his life, in trust, first to secure certain advances, and then for the benefit of his wife. The advances were made, and the assignment executed, but no trust in favor of the wife was declared, or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, and in his evidence stated that the settlor might have absorbed the whole amount, if he (the trustee) had seen fit to advance it. After the death of the settlor, all the advances were paid, and the residue of the insurance moneys invested for the benefit of the widow.

*Held*, that so far as the interest of the widow was concerned, the settlement was void, as against creditors.

**ROSS V. ROSS.**

*Will—Construction of—Revocation in Equity.*

A testator devised his real estate and personal property to two persons; after making his will, testator contracted to sell the real estate, but the contract was never carried out; and after his decease in October, 1862, the parties interested under the contract agreed to rescind the same, which was done accordingly.

*Held*, that the contract operated in equity as a revocation of the will, as regarded the beneficial interest in the real estate; that the interest in the contract passed to the legatees under the residuary clause; that the devisees being also legatees of the personal estate were entitled to the land, and that it did not go to the heirs-at-law.

**HAMILTON & P. D. R. Co. v. GORE BANK.**

*Corporation—Corporate Seal—Sheriff's Poundage.*

A bank having executions against a railway company in the hands of the Sheriff, the secretary of the company, in order to avert a seizure of a quantity of railroad iron, signed a letter, agreeing that the bank, out of moneys coming to their hands from certain garnishees proceedings, taken by the bank against debtors of the company, might retain "a sufficient amount fully to cover all your solicitor's costs, charges and expenses against you, or against you and us; as between attorney and client, or otherwise; as well as the costs, charges, and expenses of your bank, of what nature or kind soever, and after the payment of such, in the second place to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the board of directors of the company, although two members of the board were aware of it, and one of them—the Vice-President of the company—authorized it.

*Held*, that this was not such an act as the officers of the company were authorized in the discharge of their duties to perform; and that, although the bank granted the time asked for, they could not enforce payment of the amounts stipulated for.

A Sheriff is only entitled to poundage on the moneys actually passing through his hands. Where, therefore, the parties to a suit arranged outside the Sheriff's office for the payment of \$3,000 on account of an execution in his hands, and the plaintiffs in the cause paid his poundage on that amount, as well as the moneys actually paid to the Sheriff, the Court refused to allow them to charge the amount against the defendants.

**RICE V. GEORGE.**

*Tenants in common—Rents—Improvements.*

A tenant in common being in actual occupation of the joint estate, forms no ground for charging him with rent; it would be otherwise, however, if he had been in the actual receipt of rent from third parties.

One of several tenants in common, or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor, unless on the other hand he consents to be charged with occupation rent.

*Semble*. That one tenant in common selling timber off the joint property is not chargeable with sums realized therefrom.



## NOTES OF RECENT DECISIONS—MICHIGAN CEN. R. R. CO., v. MINERAL SPRINGS MAN. CO.

## COMMON LAW CHAMBERS.

## OAKLEY v. TORONTO, GREY, AND BEUCE RAILWAY COMPANY.

*Administration of Justice Act 1873—Meaning of the word "officer" in section 24.*

[January 12, 1874—MR. DALTON.]

This was an application for an order to examine the Chief Engineer of the defendants.

*Held*, that the Chief Engineer was an officer of the Company within the meaning of section 24 of the Administration of Justice Act for 1873.

## LLOYD v. HENDERSON.

*Administration of Justice Act, 1873—Affidavit required by section 29.*

[January 14, 1874—MR. DALTON.]

The affidavit in support of a motion under section 29 of the Administration of Justice Act, 1873, for an order for the examination of the defendant, was made by the partner of the plaintiff's attorney.

*Held*, sufficient to satisfy the requirements of the section.

In the case of *Hamilton v. Great Western Railway Company* the affidavit in support of a similar application was made by the managing clerk, and Mr. Dalton held it to be sufficient.

## UNITED STATES REPORTS.

## SUPREME COURT.

## MICHIGAN CENTRAL R. R. CO. v. THE MINERAL SPRINGS MANUFACTURING COMPANY.

A. delivered to plaintiff goods to be carried to a point beyond its line. Plaintiff carried them to the terminus of its road, but the carrier that should have completed the transit not being ready—and that it would not be plaintiff knew at the receipt of the goods—they were stored in the plaintiff's warehouse. They remained there six days, when they were accidentally destroyed by fire. Plaintiff, by its charter, was to be "liable for goods on deposit in any of its depots awaiting delivery, as warehousemen." On the back of the receipt given the shipper was a general notice, that all goods, etc., while in the plaintiff's warehouse, should be at the risk of the owner, except as to the negligence of its servants. *Held*:

1. While property is in process of transportation it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond.
2. If there be necessity for storage, it will generally be considered a mere necessity to the transportation, and not as changing the nature of the bailment.
3. It may be that circumstances may arise justifying the carrier in warehousing goods, but if he had reasonable

grounds to anticipate such adverse circumstances when he received the goods, and did not notify the shipper, he cannot by storing them change his liability.

4. The exception in plaintiff's charter referred only to goods that had reached their final destination.
5. A carrier cannot restrict his liability by a general notice printed on the back of his receipt for goods.
6. A carrier has no right to assume, in discharge of his obligation, that an offer to deliver will be met with a refusal to receive.

## Opinion by Mr. Justice Davis.

If the plaintiffs in error are to be considered as warehousemen at the time the wool in question was burned, they are not liable in this action, because the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there are no circumstances connected with the transaction which lessen the rule applicable to that employment, they are responsible, for carriers are substantially insurers of property entrusted to their care. The controversy is as to the nature of the bailment when the fire took place.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error is prosecuted to reverse that decision. The case, as contained in the bill of exceptions, is, in substance, this:

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the company, for transportation, a quantity of wool, consigned to the defendant in error, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners, while in the warehouse of the company, unless the loss or injury to them should happen through the negligence of the agents of the company. Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboat, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of

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MICHIGAN CENTRAL R. R. Co., v. MINERAL SPRINGS MAN. Co. [U. S. Rep.

the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, or the station master at Jackson, were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire. During all the time it was in the depot it was ready to be delivered for further transportation to the carrier upon the route indicated. The charter of the company which was pleaded and offered in evidence, contains a clause, that in all cases the company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers.

On this state of facts the Circuit Court refused to charge the jury that the liability of the plaintiffs in error was the limited one of a warehouseman importing only ordinary care, but, on the contrary, charged that they were liable for the wool as common carriers during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in the line, but that the defendants in error took the risk of the next carrier line not being ready and willing to take said wool, and submitted to the jury to say whether, under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

It is not necessary in the state of this record to go into the general subject of the duty of the carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that

there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery, or an attempt to deliver, to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by an act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless, through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defence, this limited ability of the propeller line, when the officers of the road knew of it at the time the contract of carriage was entered into and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the

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wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper, was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favour, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so, when, as in this case, there were other lines of transportation from Detroit eastward, by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit, to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done, there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery. They cannot, therefore, complain of the response of the jury to the enquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved from liability under the provisions of their charter, if not by the rules of the common law. Is this so?

The whole section of the charter from which the exemption from liability is claimed is as follows:—"The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified, if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property, at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged after the expiration of said twenty-four hours upon goods not taken away: *Provided*, That in all cases the

said company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers."

It is quite clear that this section refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge rather than limit the operation of it. This it cannot do, unless words are used which leave no doubt the Legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage; that in both cases as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error *v. Hale*, 6th Michigan, 243. The Court in speaking on this subject says, "That goods are on deposit in the depots of the company, either awaiting transportation or delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York (*Mills v. Michigan Central R. R. Co.*, 45 New York, 626), in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt, is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

This notice is general, and not confined, as in the section of the charter we have considered,

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to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was doubtless intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of company, whether for transportation on their own line or beyond, or for delivery to consignees. And such will be the effect if the party taking the receipt for his property is concluded by it. The question is therefore presented for decision, whether such a notice is effectual to accomplish the purposes for which it was issued.

Whether a carrier when charged upon his common law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court, since the cases of the *New Jersey Steam Navigation Co. v. The Merchants' Bank* (8th Howard), and *York Company v. Central Railroad* (3 Wallace). In both of the cases the right of the carrier to restrict or diminish his liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the case in Howard the effect of a general notice by the carrier seeking to distinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much controverted subject.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by any act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or not be assented to. He is bound to receive and carry all goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duty of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing

should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of this case equality does not exist, and, therefore, every intendment should be made in favour of the shipper when he takes a receipt for his property with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the proposed terms, he can transact business on any terms he chooses to prescribe. The shipper as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by assuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering. See 2 Parsons on Contracts, p. 238, note n, 5th edition, and the American note to *Cogge v. Bernard*, 1 Smith's Leading Cases, 7th American edition; Redfield on Law of Railway, p. —, 16 Michigan; *McMillan v. M. S. & O. I. R. R. Co.*, p. 109, and following. And many of the

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courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this resistance has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the Legislature, passed after the loss in this case occurred, it is declared that "no railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract or in any other manner except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried." Statutes of Michigan, compilation of 187—, page 783, section 2,386.

It is fair to infer that this kind of legislation will not be confined to Michigan if carriers continue to claim exemption from common law liability through the medium of notices like the one presented in defence of this suit:

These views dispose of this case, and it is not necessary to notice particularly the instructions which the court below gave to the jury. If the court erred at all, it was in charging more favorably for the plaintiffs in error than the facts of the case warranted.

The judgment is affirmed.—*Internal Revenue Record*.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS

FOR MAY, JUNE AND JULY, 1873.

From the American Law Review.

(Continued from page 26.)

## LIBEL.

Statements made before a British military court of inquiry are privileged although false and malicious.—*Davkins v. Lord Rokeby*, L. R. 8 Q. B. (Ex. Ch.) 255.

LICENSE.—*See INNKEEPER*.

## LIEN.

1. It is legally possible for the master of a vessel to land his cargo without losing his lien for freight.—*Mors-le-Branch v. Wilson*, L. R. 8 C. P. 227.

2. A., an administratrix, entitled to dower in her husband's real estate, and to one-third of his personal estate, executed with her intended second husband a marriage settlement, settling her estate to her separate use with power of appointment by deed or will. With consent of her husband, A. instructed her bankers to keep separate accounts, and to consider any overdraft on her private account secured by deposits in their hands under her account as administratrix. A. was

allowed to overdraw her private account on the faith of large deposits under her account as administratrix. By her will A. exercised her power of appointment in favor of certain parties. *Held*, that whether or not the bankers had notice of said settlement they were entitled, against said appointees, to a lien on the funds in their hands under said administratrix account for payment of the sums overdrawn on said private account.—*London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572.

## LIMITATION.

A testator gave property in trust for B. for life, or until he should become bankrupt or insolvent or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over. B. executed a composition deed reciting that he was indebted in divers sums of money which he was unable to pay in full, and covenanting to pay 10s. in the pound. *Held*, that B. was bound by the above recital, and that his interest in said property ceased.—*Billsen v. Crofts*, L. R. 15 Eq. 314.

## LIMITATIONS, STATUTE OF.

A. had an illegitimate son by a woman whom he subsequently married, and by whom he had another son, the eldest legitimate son. The illegitimate son was always treated as legitimate, and upon his marriage, in 1823, an estate which had been settled upon A. and his first and other sons in tail male, was settled upon said illegitimate son. The illegitimate son remained in possession until his death, in 1842, when his eldest son entered. In 1866 said legitimate son of A. first learned that his brother was illegitimate. On demurrer to a bill by said legitimate son of A., praying that those claiming under said settlement might be ordered to give up possession to him, *held*, that the case was a proper one for a court of equity to entertain; that there was a case of concealed fraud within the Statute of Limitations of 3 & 4 Will. 4, c. 27, s. 26; and that time did not begin to run against the plaintiff until the time when he might first with reasonable diligence have discovered the fraud.—*Vane v. Vane*, L. R. 8 Ch. 383.

MAINTENANCE.—*See JURISDICTION*.MARINER.—*See LEGACY*, 7.MARRIAGE SETTLEMENT.—*See CONTRACT*, 1; *SETTLEMENT*.MARRIED WOMAN.—*See ANTICIPATION*.

## MARSHALLING ASSETS.

A testator domiciled in England died possessed of personal estate and of real estate in Scotland. His will was ineffectual according to the law of Scotland to pass real estate, which accordingly descended to his heir at law. *Held*, that the liability of said real estate to the payment of debts, as between the heir and pecuniary legatees, must be determined by the law of Scotland and not by

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the law of England, where the testator's estate was being administered.—*Harrison v. Harrison*, L. R. 8 Ch. 342.

**MASTER AND SERVANT.**—See **EMBEZZLEMENT**.

**MILITARY COURT.**—See **LIBEL**.

**MINES.**—See **RESERVATION**.

**MISTAKE**

A deed was executed conveying a moiety only of a parcel of land instead of the whole. On a bill praying that the deed be rectified, *Held*, that the original deed might be rectified by alteration of the words in it, and that an additional conveyance of said unconveyed moiety was not necessary.—*White v. White*, 15 Eq. 247.

See 3; **WILL**.

**MORTGAGE.**—See **SPECIALTY DEBT**.

**MULTIFARIOUSNESS.**—See **DISCOVERY**, 1.

**NEGLIGENCE.**—See **CARRIER**; **RAILWAY**, 1, 2.

**NEW TRIAL.**—See **COSTS**, 2.

**NOTICE.**—See **INSURANCE**, 3; **PRIORITY**.

**NUISANCE**

An injunction was granted on the circumstances of the case to restrain the defendant from using the ground floor of his house as a stable, and creating a nuisance from the noise of his horses.—*Ball v. Ray*, L. R. 8 Ch. 467.

**PARLIAMENTARY LAW**

A peer of parliament is incapacitated from voting at an election for members of the House of Commons, and is not entitled to be placed upon the list of voters.—*Earl of Beauchamp v. Madresfield*, L. R. 8 C. P. 245.

**PARTNERSHIP**

1. A nurseryman devised and bequeathed all his real estate, upon part of which he had carried on his business, and his residuary personal estate to his three sons as tenants in common. After the testator's death, a contract for the purchase of additional land for said business purposes, which had been entered into by the testator, was completed by the sons. Subsequently one of said brothers conveyed to the other two his undivided third in said real and personal estate, which was purchased by said two brothers for said business purposes. *Held*, that said land being used for business purposes must be considered partnership property and personal estate.—*Waterer v. Waterer*, L. R. 15 Eq. 402.

2. A., a partner in a banking firm, was appointed treasurer of a Board of Guardians, and gave bond for the performance of his duties, with B., also a partner, and C., not a partner, as sureties. All sums of money received by A. as treasurer were deposited in said bank. The bank stopped, owing a considerable sum to said board. The sureties each paid half of the deficit to said board; and then B. claimed to prove against A.'s separate estate. The claim was disallowed.—*Lacey v. Hill*, L. R. 8 Ch. 441.

See **CARRIAGE**; **COPYRIGHT**.

**PATENT**

1. A patentee who had his machines manufactured by an agent obtained an injunction against an infringing manufacturer, and the latter was ordered to file an affidavit stating the number of machines made by him since the date of the patent, and the names and addresses of the persons to whom the machines had been sold, but was not required to give the names of the agents concerned in the transactions.—*Murray v. Clayton*, L. R. 15 Eq. 115.

2. A patent was taken out in America, afterwards in England, and two days later in France. The French patent expired. The Privy Council refused to recommend that the term of the English patent be extended, on grounds of public policy.—*In re Blake's Patent*, L. R. 4 P. C. 535.

**PEDLAR**

Twelve ladies made garments of materials purchased by others, carried the garments from house to house for sale, and used the profits for a village school and religious purposes. *Held*, that the ladies were not "pedlars" under the Pedlars' Act, 1871, § 8.—*Grogg v. Smith*, L. R. 8 Q. B. 302.

**PRER.**—See **PARLIAMENTARY LAW**.

**PENALTY**

By statute the master of a vessel is obliged when going from Quebec to Montreal to take a pilot, under a penalty which is to go to the Decayed Pilot Fund. The master of a vessel going to Montreal took a pilot, who so guided the vessel that a collision occurred. *Held*, that the master was not liable for the collision; where a statute inflicts a penalty for not doing an act, the penalty implies a legal compulsion to do such act.—*Redpath v. Allen. The Hibernian*, L. R. 4 P. C. 511.

**PERIL OF THE SEA.**—See **INSURANCE**, 3.

**PERSONAL ESTATE.**—See **PARTNERSHIP**, 1.

**PLEADING.**—See **BANKRUPTCY**, 1; **BILL IN EQUITY**; **BILLS AND NOTES**.

**POWER**

1. Under a marriage settlement, G. had a power of appointment over a trust fund. He directed a portion to be held upon such trusts, to take effect only after the marriage of L., as L. should by deed appoint, and until such appointment in trust for L. for life, remainder as L. should by will appoint. *Held*, that said appointment by G. was void for remoteness. G. also appointed another portion of said fund upon similar trusts for E., who subsequently married. G. then reciting the appointments in favor of L. and E. confirmed the same, and made additional appointments with power to revoke the "direction and appointment thereby made." *Held*, that there was a valid reappointment in favor of E.; and that said power of revocation extended only to appointments made by way of "direction and appointment," and not to those made by way of confirmation, and that therefore G. had no power to revoke the appoint-

## DIGEST OF ENGLISH LAW REPORTS.

ment to E.—*Morgan v. Gronow*, L. R. 16 Eq. 1.

2. K. had a power of appointment over certain property by any instrument in writing sealed and delivered in the presence of a witness. K. wrote and signed a paper stating, "If I die suddenly, I wish my eldest son to have it [said property]. My intention is to make it over to him legally if my life is spared." *Held*, that there was a defective execution of the power, which a court of equity would hold effectual.—*Kennard v. Kennard*, L. R. 8 Ch. 227.

See ANTICIPATION; APPOINTMENT; LIEN, 2; PRIORITY; SETTLEMENT, 2, 4; SPECIALTY DEBT.

PRACTICE—See ALIMONY; TENDER; WRIT.

## PRESCRIPTION.

The defendant was bound by prescription to maintain a fence between his and the plaintiff's land. The defendant sold the "fallage" of the wood on his land to H., who cut down a tree which in falling broke down a large portion of the fence. The plaintiff's cows passed through the gap and fed on the leaves of a yew-tree which had been felled, and died in consequence. *Held*, that the defendant was liable for the loss of the cows.—*Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

PRESUMPTION.—See BANKRUPTCY, 3; EXECUTORS AND ADMINISTRATORS.

PRINCIPAL AND AGENT.—See ATTORNEY; CARRIER; COMPANY, 2; FRAUDS, STATUTE OF, 2; INNKEEPER; VENDOR AND PURCHASER, 1.

## PRINCIPAL AND SURETY.

A. and B., partners, were jointly and severally liable on a bond to D. for partnership moneys. B. purchased A.'s share in the partnership and assumed his liabilities, covenanting to save him harmless. B. made an arrangement with his creditors under the English Bankrupt Act, 1869, and the creditors, including D., passed resolutions to accept a composition payable by instalments extending over two years. Afterward a deed was executed releasing B. and reserving to creditors all rights against sureties or persons other than B. *Held*, that the effect of said resolutions was to give time to B. and discharge A.—*Wilson v. Lloyd*, L. R. 16 Eq. 60.

## PRIORITY.

Funds were vested in trustees in trust for L. for life, without power of anticipation, and after her death for her children, and if no children, for such persons as she should appoint. In 1843, L. appointed that, in case she should have no children, said trustees should raise sufficient out of the fund to pay a debt of her husband, and the trustees were notified of the appointment. Subsequently, in place of the old trustees, new trustees were appointed who had no notice of said appointment, and at the request of L. and her husband dealt with the trust funds so that they were diminished. L. died without children.

In May, 1870, the trustees received notice of a charge in favor of B., dated 1864, and in October, 1870, of the deed of 1843. *Held*, that the charge under the appointment of 1843 took priority over the charge of 1864; and that the new trustees having received no notice of the appointment of 1843 were not obliged to make good the loss which their action had occasioned.—*Phipps v. Lovegrove*, L. R. 16 Eq. 80.

See SPECIALTY DEBT.

PRIVILEGED COMMUNICATION.—See DISCOVERY, 2, 3; LIBEL.

## PROBATE.

If a will has been proved in a foreign country, a certified copy will be admitted to probate in England, and an English court will not allow the validity of the will to be there questioned.—*Miller v. James*, L. R. 3 P. & D. 4.

PROBATE COURT.—See RECEIVER.

PRODUCTION OF DOCUMENTS.—See DISCOVERY, 3.

PROOF.—See BANKRUPTCY, 4, 5; PARTNERSHIP, 2.

## RAILWAY.

1. The plaintiff was injured while travelling on the defendant's railway by the train of another company, which had statutory running powers over said railway on paying certain tolls. The defendants were guilty of no negligence. *Held*, that the defendants were not liable.—*Wright v. Midland Railway Co.*, L. R. 8 Ex. 137.

2. The plaintiff was travelling in a railway carriage, and leaned slightly against the door for the purpose of seeing the signal lights of the next station. The door immediately flew open, and the plaintiff fell out and was injured. The jury found a verdict for the plaintiff. *Held*, that there was evidence of the railway company's liability.—*Gee v. Metropolitan Railway Co.*, L. R. 8 Q. B. (Ex. Ch.) 161.

See CARRIER.

REAL ESTATE.—See PARTNERSHIP, 1.

## RECEIVER.

The court has jurisdiction to grant a receiver of personal estate pending the grant of probate, which has been delayed by a caveat in the probate court; where, however, no actual suit has been begun. Also of the rents of real estate, under the same circumstances, where neither the devise nor the heir-at-law is in actual possession.—*Parkin v. Seddons*, L. R. 16 Eq. 34.

RELATIONS.—See LEGACY, 3.

RELEVANCY.—See BILL IN EQUITY.

REMEDY.—See EXECUTORS AND ADMINISTRATORS, 1.

REMOTENESS.—See POWER, 1.

RENT.—See SPECIALTY DEBT.

REPUTED OWNERSHIP.—See BANKRUPTCY, 3.

## DIGEST OF ENGLISH LAW REPORTS.

**RESERVATION.**

Land was conveyed to M. subject to a reservation of all mines and minerals to the grantors, with power to use sufficient land for working the same; and it was provided that it should not be lawful for M. to do any thing whereby the grantors should be obstructed in the exercise of their powers, and that the grantors should pay reasonable compensation for damage or spoil of ground occasioned by exercise of said powers. *Held*, that M. was not entitled to compensation in respect of the mere existence of old pits, but was entitled to compensation for future damage occasioned thereby, and for land used as accessorial to such pits, not so used at the time of the conveyance. Also, that compensation should be assessed with reference to the value of the land for any purpose to which it might be reasonably considered as applicable; and that M. might use said land in any way, provided he did not take the minerals themselves.—*Mordue v. Dean and Chapter of Durham*, L. R. 8 C. P. 338.

**RESIDUARY BEQUESTS.**—*See* LEGACY, 2, 6.

**REVOCAION.**—*See* LEGACY, 4; SETTLEMENT, 2; WILL, 7, 8.

**SALE.**—*See* TROYER; VENDOR AND PURCHASER, 1, 2.

**SCANDAL.**—*See* BILL IN EQUITY.

**SEAMEN.**—*See* LEGACY, 7.

**SERVICE.**—*See* WRIT.

**SETTLEMENT.**

1. Upon marriage, a woman induced her husband to give up his only means of support, and thereafter for a time both were supported by the wife's mother. After the latter's death, the wife came into a large separate income. From the wife's misconduct the husband was obliged to leave her, and eventually a settlement was made whereby the husband was allowed a small annuity. Subsequently the wife became possessed of a further sum, and prayed the court to decree a settlement of the same upon her. *Held*, that under the circumstances the court would not deprive the husband of his right to said sum.—*Giacomatti v. Prodgers*, L. R. 8 Ch. 388; s. o. L. R. 14 Eq. 253; 7 Am. Law Rev. 488.

2. A woman executed a voluntary settlement in which was reserved no power of revocation. The deed was delivered to the trustee of the settlement and re-delivered to the woman; who subsequently asked and obtained permission of the master to execute a mortgage of the property. Afterward the woman destroyed the deed of settlement, and expressed her satisfaction at having got rid of it. *Held*, that said settlement was valid and irrevocable, and not affected by omitting a power of revocation.—*Hall v. Hall*, L. R. 8 Ch. 430.

3. A wife was entitled to an equity to a settlement in a sum of money. The court directed that in case of the death of the wife and her children the fund should go to the husband whether dying in the lifetime of his wife or not.—*Walsh v. Wason*, L. R. 8 Ch. 483.

4. A husband and wife, having power of appointment over personally, in favor of the children of the marriage, appointed a part of the property to trustees, on such trusts as their son H. should by deed appoint with the written consent of his father, and after the decease of his father, with the consent of the trustees under said father's will, or as said H. should by will appoint; and in default of appointment upon trust, to pay the income thereof for life, or until bankruptcy, insolvency, or assignment, and on the decease of said H., if his interest should not have determined, to his executors or administrators, as part of his personal estate; but if such interest should have determined, upon the like trusts as would have affected the residue of the same share, if the same had been appointed in favor of H. only during his life, or until the period of such determination. *Held*, that H. was absolutely entitled to his share, subject to forfeiture in case of bankruptcy or assignment. By settlement, husband and wife had a life estate in realty, with power of appointment among children, and in default of appointment, in trust for the children, subject to parents' life interest, in equal shares, to vest at twenty-one or marriage. The settlement contained the usual power of sale and exchange, but no trust for sale. A son reached twenty-one and died intestate. Afterwards the husband and wife declared that the shares of persons interested in money arising from any sale of the premises should be of the quality of personal and not of real estate. *Held*, that the appointors had power to convert the real into personal estate.—*Webb v. Sadler*, L. R. 8 Ch. 419; s. o. L. R. 14 Eq. 533; 7 Am. Law Rev. 483.

*See* CONTRACT, 1; LIEN, 2; POWER, 1.

**SIGNATURE.**—*See* WILL, 1, 3.

**SLANDER.**—*See* LIBEL.

**SOLICITOR AND CLIENT.**—*See* DISCOVERY, 2.

**SPECIALTY DEBT.**

A. agreed to lease a mine from B. Disputes arose between A. and B. upon the subject of the lease. An action was brought by B. and an injunction applied for by A.; but finally matters were left to arbitration. The arbitrator awarded a sum to B. to be paid by A. A. died. *Held*, that said sum was awarded as damages and not as rent, and therefore could not be proved as a specialty debt in the administration of A.'s estate.—*Talbot v. Earl of Shrewsbury*, L. R. 16 Eq. 26.

**SPECIFIC PERFORMANCE.**

The court decreed specific performance of an agreement to execute a mortgage with an immediate power of sale.—*Hermann v. Hodges*, L. R. 16 Eq. 18.

**STATUTE.**—*See* ATTORNEY; BANKRUPTCY, 3; DAMAGES; PEDLAR; PENALTY; PRINCIPAL AND SURETY.

**STATUTE OF FRAUDS.**—*See* FRAUDS, STATUTE OF.



## DIGEST OF ENGLISH LAW REPORTS.

**STATUTE OF LIMITATIONS.**—*See* LIMITATIONS, STATUTE OF.SUBPENA.—*See* DISCOVERY, 2.SUBROGATION.—*See* COSTS, 1.SURETY.—*See* PRINCIPAL AND SURETY.TENANT FOR LIFE.—*See* ANTICIPATION.**TENDER.**

In a case of salvage the Cinque Port Commissioners awarded £800. The owners appealed, and tendered by act in Court £100 and costs. *Held*, that such tender could be made, although no tender had been made before the appeal.—*The Annette*, L. R. 4 Ad. & Ec. 9.

TITLE.—*See* CHARITY; VENDOR AND PURCHASER, 2.TORT.—*See* TROVER.**TROVER.**

B. held goods under a bill of sale, which was set aside as fraudulent as against the trustee of the seller, who was bankrupt. At the application of the trustee, B., who had sold the goods, was ordered to pay over the proceeds to said trustee. *Held*, that said trustee had affirmed said sale by B., and therefore could not bring trover against B. for the difference between the value of said goods and the amount of proceeds of said sale.—*Smith v. Baker*, L. R. 8 C. P. 350.

**TRUST.**

A testator on his death-bed told F. and her husband that he had left them the bulk of his property, and requested them to pay an annuity to N., which they promised to do. *Held*, that the bequests to F. and her husband in the testator's will were subject to a trust for the payment of said annuity.—*Norris v. Frazer*, L. R. 15 Eq. 318.

See 2; PRIORITY.

**UNCONSCIONABLE BARGAIN.**

Actions restrained upon bills obtained for sums advanced with extortionate interest thereon from a minor entitled to a large property in the event of his surviving his father. Discussion of doctrines of equity as to relief of expectant heirs from unconscionable bargains.—*Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

**UNDUE INFLUENCE.**

Comments upon the degree of influence exercised by a legatee upon the testator necessary to sustain a plea of undue influence.—*Parfitt v. Lawless*, L. R. 2 P. & D. 462.

**USES, STATUTE OF.**

The owner of a fee granted to B., C., and D. a perpetual yearly rent charge of £9, "to hold the said rent charge unto A., B., and C., their heirs and assigns, to the use of the said A., B., and C., their heirs and assigns, forever as tenants in common, and in equal shares." *Held*, that the grant operated as a grant at common law, and not under the Statute of Uses.—*Orme's Case*, L. R. 8 C. P. 281.

**VENDOR AND PURCHASER.**

1. E. purchased a lot of land at auction, and agreed to take the timber thereon, which was sold separately, at a price stated by the auctioneer. In stating the price of the wood, the auctioneer accidentally omitted in the valuation a considerable portion of the wood upon said lot. *Held*, that the sale would not be set aside because of the mistake of the auctioneer.—*Griffiths v. Jones*, L. R. 15 Eq. 279.

2. Land was sold at auction subject to the conditions that the vendors should, within seven days, deliver an abstract of their title, and that all objections to the title not stated by the purchaser within fourteen days should be considered waived; the purchaser failing to comply with said conditions to forfeit his deposit. W. purchased the estate, and the vendors within seven days delivered an abstract showing no title. The purchaser, after the expiration of fourteen days, objected to the title. It subsequently appeared that the vendors' title was insufficiently set forth in the abstract. *Held*, that the purchaser was entitled to recover back his deposit, as no complete abstract of title had been delivered, and as said conditions did not apply to the case of the vendors being unable to give a title.—*Went v. Stallibrass*, L. R. 8 Ex. 175.

VERDICT.—*See* CRIMINAL LAW, 2.**VESTED INTEREST.**

A testator gave a legacy to J. to be vested in him on attaining the age of twenty-one years, or if he should die under that age, leaving lawful issue at his death. In case he should die without attaining a vested interest, then over. J. attained twenty-one years, and died in the testator's life-time, leaving a daughter. *Held*, that J. died without attaining a vested interest, and that the gift over took effect.—*In re Gaiskell's Trust*, L. R. 15 Eq. 386.

**WILL.**

1. The deceased requested two illiterate persons to place their signature upon a paper. No explanation was given of the document, and there was no evidence that the name of the deceased was upon the paper when said witnesses signed it. *Held*, that the document was not duly executed as a will.—*Pearson v. Pearson*, L. R. 2 P. & D. 451.

2. A testator made two wills containing inconsistent dispositions of his property. The first will only nominated an executor. With consent of all parties, both wills were admitted to probate, and said executor appointed.—*In the Goods of Griffith*, L. R. 2 P. & D. 467.

3. A witness to a will stated that on entering the room where the testator was, he was desired by D. to witness the testator's will. No other allusion was made to the will, and nothing was said by the testator. *Held*, that there was no evidence that the testator acknowledged his signature to the will in the presence of the witness.—*Morritt v. Douglas*, L. R. 3 P. & D. 1.

## DIGEST OF ENGLISH LAW REPORTS.—CORRESPONDENCE.

4. A testator gave instructions to his attorney to prepare his will, with particular directions as to his residuary personal estate. A will was drafted in which the word "real" was inserted instead of "personal" in the residuary clause, by mistake of the attorney, and in that form the will was signed. *Held*, that the alleged mistake could not be corrected.—*Harter v. Harter*, L. R. 3 P. & D. 11.

5. A testator made a will and codicil referring to the will by its date. The name of the executor appointed in the will was written upon an erasure. *Held*, that the declaration of the testator made before the execution of the codicil that he had appointed said person named in his will his executor was admissible in evidence.—*In the Goods of Sykes*, L. R. 3 P. & D. 26.

6. A testator executed a will in 1866 and a codicil thereto in 1871. In 1871 he executed a will revoking all other wills and codicils. In 1872 he executed a codicil to the will of 1866, concluding, "I confirm the appointment of my son as executor of my will and codicil." *Held*, that the will of 1866 was revived, but not the codicil of 1871.—*In the Goods of Reynolds*, L. R. 3 P. & D. 35.

7. A testator in a fit of delirium tremens destroyed his will. The pieces were preserved and the testator subsequently observed that he must have been insane when he destroyed the will, and that he would make another. *Held*, that there had been no revocation of the will.—*Brunt v. Brunt*, L. R. 3 P. & D. 37.

8. A testator born in Ireland, but domiciled in Spain, executed a will in England, and several codicils in Spain, and a further codicil in England, confirming said will in whatever it did not clash with the codicil, which was to be considered as the testator's last will. *Held*, that the Spanish codicils were not revoked.—*In the Goods of De La Saussaye*, L. R. 3 P. & D. 42.

See APPOINTMENT; CHARITY; CLASS; CONDITION; ESTOPPEL; EVIDENCE; LIMITATION; PROBATE; TRUST; INDIRECT INFLUENCE; VESTED INTEREST.

## WORDS.

"Costs to abide the event."—See COSTS, 2.

"Heirs."—See LEGACY, 1.

"Insanity."—See INSANITY.

"Nephews and Nieces."—See DEVISE, 1.

"Sickness."—See INSANITY.

"Specifically."—See DEVISE, 3.

## WRIT.

The defendants were a Scotch railway company, having no part of their railway in England, but having running powers over an English railway to Carlisle. A writ was served at Carlisle on the defendants' booking clerk, who had no power beyond that of issuing tickets to passengers, and who was the only officer of the defendants in England. *Held*, that the writ was not served upon the company.—*MacKereth v. Glasgow and South-western Railway*, L. R. 8 Ex. 149.

## CORRESPONDENCE.

*Administration of Justice Act, 1873, discussed.*

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—The effect of the Act respecting the administration of justice is exciting observation in legal circles. It seems to me that one almost inevitable consequence of the increased equitable jurisdiction in the common law courts given by the Act, and which has been referred to in your valuable journal, will be to send into those courts a large amount of additional work. The temptation will then be very great to transfer all matters that savour of equity to the Court of Chancery, unless, indeed, there be some increase of judges at Common Law. It is becoming more evident at every Assize (and was notably so at the Fall Assizes in Toronto), that the present judicial strength of the Queen's Bench and Common Pleas is insufficient to overtake the vast development of litigation, which is the legitimate result of the exceeding prosperity of this Province. It is in my opinion necessary to add some members to the bench of both Common Law Courts if the legal business of the country is to be efficiently discharged. This necessity will be still more urgent if the Common Law Courts earnestly undertake and endeavour to make practically beneficial the large equitable powers entrusted to them by the Act of last Session.

Yours, &c.,

BARRISTER.

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—I have read with interest, some excellent articles in the *Canada Law Journal*, on the Administration of Justice Act, 1873. I also noticed some timely observations on the Administration of justice in Toronto, in which prominent notice is given to a suggestion, to have separate concurrent sittings of the Civil and Criminal Courts of superior jurisdiction in Toronto.

The great objection to my mind is the want of a sufficient number of Judges. With an adequate number of Judges there would be no practical difficulty in

## CORRESPONDENCE.

having concurrent Civil and Criminal Courts sitting as in England.

The present judicial staff is numerically weak. Each Judge is taxed to his utmost, from the beginning to the end of the year; and no respite can be granted to any without inconvenience to all. The judiciary is now worked on the assumption that all the Judges will be at all times in good health, and able to discharge their important and responsible duties. Should a Judge be unable to do his work there is no other Judge to take his place. The only alternative is to permit him to appoint a County Judge or Queen's Counsel. The difficulty of getting a Queen's Counsel in practice to accept such temporary employment is only too well known to those who have been compelled to resort to this expedient; and there is even a difficulty in getting a competent County Judge to do the work. Besides it is notorious that "Journeyman Judges," even when procured to take seats temporarily on the Bench of the Superior Courts, do not command either the respect or attention of those whose place they fill. Resorts to such expedients are in every aspect unsatisfactory, and are only justifiable so long as the judicial staff is kept at its minimum as regards numbers, and worked to its maximum. The continuance of this system is a reproach to the intelligence and wealth of our country. Money spent in securing the prompt, firm and decent administration of justice, either criminal or civil, is well spent. It is to be hoped that the day is near at hand when we shall be able to hail the advent of a different state of things.

Some contend that each of our Superior Courts of Law and Equity ought to be presided over by at least five Judges; but having regard to the future, as well as the present, I do not think the appointment of six new Judges, four Common Law and two Chancery, would be at all beyond the mark. I would prefer a court composed of an uneven number of Judges, for the same reason that three arbitrators are preferred to two. The principle is that there may be a majority decision where there is a probability of differences of opinion. It may be said that the differences among our Judges are so rare that no provision of the kind is necessary, and that four Judges in each Court would for the pre-

sent answer every needful purpose. If the Judges were not so hard pressed for time, it is possible that differences of opinion would be more frequent. Litigants have a right to the judgment of each Judge on each case argued before them. If, for want of time or other such cause, one of several Judges defers merely to the judgment of his brother Judge or Judges, he denies to the litigant his full rights. I do not say that this at present is the case; but certainly when Judges are overworked there is danger of such being the case.

An increase of the Judges is absolutely needed; the measure of that increase must, according to legal fiction, be left to the wisdom of Parliament. The responsibility of delaying or granting the reform, however, rests with the Attorney-General of Ontario. None knows better than he, an ex-Judge of an over-worked Court, the pressing need of such a reform. He possesses the ability, as well as the knowledge necessary to the reform. Some have argued that so long as one political party ruled in the Government of Ontario, and their opponents in the Government of the Dominion, there would be no increase of the judiciary. For my part, I never saw anything in that argument. The importance of having the best men independent of political considerations, is so great, that Governments, both here and in England, as often select their political opponents as their political friends for judicial appointments. The last appointment made by Sir John A. Macdonald to the Court of Chancery was an instance of this. But now that the same political party rules both in Toronto and Ottawa, even the shadow of an excuse for delay is removed.

I read with much interest the charge of Mr. Justice Wilson at the opening of the Toronto winter assize. He is one of the most conscientious and painstaking of our Judges. He has never been known to shirk his work; and when he, in language cogent, supported by figures which cannot be questioned, advocated an increase of the judiciary, the public can fairly judge of the necessity for the change and the urgency for immediate action.

Yours, &c.,

SIGMA.

TORONTO, January 24, 1874.

## CORRESPONDENCE—REVIEWS.

## TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—As the time is drawing near when we are all to practice after the manner of the right wing of Osgoode Hall, perhaps it would be well to consider some of the provisions of the Act that is to bring about the "wholesome reform."

1. Under sec. 11, of the Act (36 Vict. cap. 8), "When in the opinion of a Court of Common Law, or a Judge thereof, it is necessary or proper in any action, to take accounts, &c., which cannot conveniently or properly be taken under the existing practice at law, the Court or Judge may order such accounts to be taken by the Master or any of the Local Masters of the Court of Chancery."

Now that section is unfair to Deputy Clerks of the Crown. Why should they not be qualified to take such accounts? Are the Judges of Common Law Courts to be obliged to send to Chancery officials who are in no way officers of their Courts?

2. What would be "sufficient reasons" (in the plural) under sec. 16?

3. Why not include breach of promise of marriage under sec. 17. Supposing a notice for a Jury has been given under the Law Reform Act in actions not included in sec. 17 of the Act under notice, is it not "too much reform" to give a Judge power to say a jury shall not be had though desired?

4. Under sec. 19, (read sec. 16), if the case be one in which a jury has been demanded, and if neither party asks to have the equitable issues tried by jury, under sec. 16, is the Judge to try the equity side and the jury the legal issue, or the Judge give way to the jury, or the jury to the Judge?

5. Sec. 20: Why not except slander?

6. Sec. 21: Why not let the third Judge "sit separately," "either at the same time or at different times?" What "business" is meant by this section? and does it in any way enlarge the powers held by a Judge in chambers? Perhaps the introduction of the chancery word *decree* means something. The profession will require a batch of rules under this section to guide them.

7. Sec. 23: Supposing decision not given until after fourth day of term, how then?

8. Sec. 24: Beyond adding costs to

the suit and getting out of your opponent the secrets of his counsel's brief, of what utility is this section? Such evidence cannot be used on the trial if the witness is within the jurisdiction, &c. (C. S. U. C. cap. 32), and the case of a witness abroad is already provided for.

9. Sec. 39: Why not file the order and issue an execution upon it?

10. Sec. 45: Supposing goods destroyed, must defendant go to gaol?

11. Sec. 48: Has a common law Judge power to order common law costs to be taken on an equitable issue tried before him?

12. What is the meaning of sec. 49?

I should be glad if some of your many readers would enlighten the rest of us on these points, through the columns of the *Law Journal*.

Yours truly,

COUNTRY ATTORNEY.

## REVIEWS.

AN EPITOME OF LEADING COMMON LAW CASES, with some Short Notes thereon. Chiefly intended as a Guide to Smith's Leading Cases; by John Judemaure, Solicitor (Clifford's Inn Prizemau, Michaelmas Term, 1872.) London, Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1873.

All students should at some time or other "read well, learn, and inwardly digest" Smith's Leading Cases. Most students who do so make an epitome of each case, as well for future reference as for present digesting. Mr. Judemaure did this when reading for his final examination as a solicitor, and has published his abridgment of each case "with some few additional ones and some Short Notes bearing directly on the different decisions." The abridgment will be useful to the student as a help to the reading of the larger volumes, but not as a substitute for them.

We have read of men eminent in the profession who yearly read Smith's Cases in order to be at all times and under all circumstances fully seized of them. A barrister or solicitor, in large practice, cannot well spare the time for such an annual reading, even should he find it desirable to do so. But to all such Jude-

## REVIEWS—FLOTSAM AND JETSAM.

maur's Epitome will be found a useful substitute. It can be read through in half an hour. The arrangement is so good, and the condensation so thorough that for casual reading no reference to the larger volume will be necessary. The book, including a full alphabetical index, is not more than 50 pages octave. It is printed by Messrs. Stevens & Hagnes, in their usual excellent style. We recommend this neat little volume as much to the busy lawyer as to the earnest student.

AN EPITOME OF LEADING CONVEYANCING AND EQUITY CASES, with some Short Notes therein, chiefly intended as a Guide to "Tudor's Leading Cases on Conveyancing" and "White and Tudor's Leading Cases in Equity." By John Judemaur, Solicitor, (Clifford's Inn, Prizeman, Michaelmas Term, 1872). London, Stevens & Hagnes, Law Publishers, Bell Yard, Temple Bar, 1873.

This is by the same author as already mentioned. The success of his Epitome of Common Law Cases was no doubt sufficient to warrant this additional volume. All that the former does for Smith's Leading Cases, this does for Tudor's Leading Cases in Conveyancing and White and Tudor's Leading Cases in Equity. The Conveyancing and Equity Cases are very properly, and for obvious reasons, epitomized together.

This, like the former volume is recommended to the busy lawyer and earnest student. In size and appearance it is about the same. Its aim is similar.

We must say we thoroughly approve of the publication of these summaries. The reading of them again and again enables the reader in effect, again and again, to travel all through the larger works without the time and toil necessary of actually doing so. Frequent readings are necessary to burnish the memory. For that purpose one reading of the summary is nearly as good as the reading of the book summarized. The difference in time between doing the one and the other is such as to make it an object to purchase the summary. If all who can make good use of the summary purchase it, the enterprising publishers will have no cause to regret that venture.

## FLOTSAM AND JETSAM.

A Prince of Wales was committed for striking a Judge, but a Deputy Sheriff may strike a Jury.

Baron Channell had a great partiality for the late Lord Westbury, when at the Bar, and placed extraordinary confidence in his opinion. Whereupon the wags said he was like Jeroboam, who set up an idol in *Bethel*.

A Troy policeman swore as follows against a prisoner:—"The prisoner set upon me, called me an ass, a precious dolt, a scarecrow, a rag-amuffin, and an idiot—all of which I certify to be true." He was a second Dogberry, whose chief anxiety in the recording of the depositions was that he should be "written down an ass."

A new thing in law has recently occurred in New Jersey. Mr. Cortlandt Parker, an eminent counsel of Newark, not being able to be present in the Court of Errors, telegraphed his brief to the Chief Justice. The brief was read to the Court, and answered the purpose. No doubt our Judges can be persuaded to countenance this practice, and thereby save much time and expense to learned counsel.

Amongst the witnesses called in the Tichborne trial to disprove the statements of the now famous Jean Luie, was one named Nicholla, who, being asked by Mr. Hawkins what name Lundgren's wife was now known by in Bristol, answered rather suddenly, to the great amusement of the Court, "Mrs. Hawkins, sir." "And what was her maiden name?" asked Mr. Hawkins, after a sly glance at his brief. "Sarah Cockburn, sir," was the equally prompt reply. When the laughter which these names excited had a little subsided, the Lord Chief Justice assured Mr. Hawkins that he felt highly honoured by the statement which he had elicited; and Mr. Hawkins, with a grave bow to the Bench, replied, "My Lord, I could not take it all to myself."

Once when a very diminutive barrister had made several futile attempts to gain the notice of the court, Jekyll explained his failure by quoting—"De minimis non curat lex." The last audacious application of this much abused maxim is perpetrated on the other side of the border. Recorder Hackett was holding general sessions in New York, and noticed on the calendar, "*The People v. Minnie Davis*—

## FLOTSAM AND JETSAM—CIRCUITS—TO CORRESPONDENTS.

Aron." He recollected it as a very interesting case, which, at a previous term, had failed because of a misnomer, but was to be tried on a new indictment. "How about the case of Miss Minnie Davis," he said to the District Attorney, "will you have trouble about the facts now?" "No," was the answer, "but the law may trouble your honour—how will you get over the maxim, *De Minnie Miss non curat lex*!"

Vice-Chancellor Malins is a most unlucky Judge—the most overruled of all the judges of first instance. Lately, however, he was very happy in his judgment on the facts in a case of an alleged invasion of the right to use as a trade mark, a label with the words "*Nourishing Stout*," thereon. He neatly put an extinguisher upon the plaintiff's claim to an exclusive use of the word "nourishing" by observing (no doubt with the unction of a true Englishman): "The word '*Nourishing*' is a word in common use, and *peculiarly adapted to good stout*." We must say that this is a much more sensible and even judicial way of dealing with the liquor in question than that which it pleased Chief Justice Read, of Pennsylvania, to assume in a case recently reported. In dissenting from the decision of the Supreme Court of that State, that the local option liquor law was constitutional, he expatiated as follows: "Ale is a healthy liquor, and lager beer is a favourite beverage, particularly of our large German population. The question of license or no license is to be submitted to the citizens of Philadelphia, at the general election in October, and if the vote is against license, then the city will be under a prohibitory liquor law during the whole Centennial Celebration, to which we have invited the whole country. On the Fourth of July, 1776, every patriot drank to the independence of the thirteen States; shall it be that on the Fourth of July, 1876, all we can lawfully offer to our guests on this great anniversary will be a glass of Schuylkill water, seasoned with a lump of Knickerbocker ice? I am a strong believer in temperance. For twenty-five years of my life I drank nothing but water, but a dangerous illness made a strong stimulant an absolute necessity, and by the advice of a physician I am obliged occasionally to resort to it. Some of my friends, older than myself, have drank wine all their lives and are temperate men. I believe in moral suasion as the true means of advancing the temperance cause, but I do not believe in a prohibitory law, which would reduce us to the condition of Boston!"

## SPRING CIRCUITS, 1874.

## EASTERN CIRCUIT.

The Honourable Mr. Justice GALT.

|                  |                      |
|------------------|----------------------|
| Cornwall .....   | Tuesday, 17th March. |
| Ottawa .....     | Tuesday, 24th March. |
| Perth .....      | Tuesday, 7th April.  |
| Brockville ..... | Monday, 18th April.  |
| Kingston .....   | Monday, 30th April.  |
| L'Orignal .....  | Tuesday, 5th May.    |
| Pembroke .....   | Tuesday, 12th May.   |

## MIDLAND CIRCUIT.

The Honourable Mr. Justice GWYNNE.

|                    |                        |
|--------------------|------------------------|
| Napanee .....      | Monday, 9th March.     |
| Whitby .....       | Tuesday, 17th March.   |
| Belleville .....   | Monday, 30th March.    |
| Cobourg .....      | Monday, 18th April.    |
| Peterborough ..... | Wednesday, 22nd April. |
| Lindsay .....      | Tuesday, 28th April.   |
| Pictou .....       | Tuesday, 12th May.     |

## NIAGARA CIRCUIT.

The Honourable the CHIEF JUSTICE OF ONTARIO.

|                      |                      |
|----------------------|----------------------|
| Owen Sound .....     | Tuesday, 10th March. |
| Milton .....         | Tuesday, 17th March. |
| Hamilton .....       | Tuesday, 24th March. |
| St. Catharines ..... | Tuesday, 14th April. |
| Welland .....        | Tuesday, 21st April. |
| Barrie .....         | Tuesday, 28th April. |

## OXFORD CIRCUIT.

The Honourable Mr. Justice WILSON.

|                 |                       |
|-----------------|-----------------------|
| Cayuga .....    | Tuesday, 10th March.  |
| Simcoe .....    | Monday, 16th March.   |
| Brantford ..... | Monday, 23rd March.   |
| Woodstock ..... | Thursday, 2nd April.  |
| Berlin .....    | Monday, 13th April.   |
| Stratford ..... | Thursday, 16th April. |
| Guelph .....    | Monday, 27th April.   |

## WESTERN CIRCUIT.

The Honourable Mr. Justice MORRISON.

|                  |                      |
|------------------|----------------------|
| Walkerton .....  | Tuesday, 10th March. |
| Goderich .....   | Tuesday, 17th March. |
| Sandwich .....   | Tuesday, 24th March. |
| Sarnia .....     | Tuesday, 7th April.  |
| Chatham .....    | Tuesday, 14th April. |
| St. Thomas ..... | Tuesday, 25th April. |
| London .....     | Tuesday, 5th May.    |

## HOME CIRCUIT.

The Honourable the CHIEF JUSTICE OF THE COMMON PLEAS.

|                                   |                      |
|-----------------------------------|----------------------|
| Brampton .....                    | Tuesday, 10th March. |
| Toronto, Assize, Nisi Prius ..... | Wednesday, 18th Mar. |
| Toronto, Oyer and Terminer .....  | Tuesday, 28th April. |

## TO CORRESPONDENTS.

The communication from "J. R." will be inserted with pleasure when he sends his name, not for publication, (though we see no reason why he should object), but to comply with a rule which we must strictly adhere to.

## LAW SOCIETY—MICHAELMAS TERM, 1873.

**LAW SOCIETY OF UPPER CANADA.**

OSCEODS HALL, MICHAELMAS TERM, 37TH VICTORIA.

**D**URING this Term, the following Gentlemen were called to the Degree of Barrister-at-Law:

- No. 1270. MAXWELL D. FRASER.  
RUFERT EYEREDGES KINGSFORD.  
JOSEPH BENJAMIN MCARTHUR.  
ROGER CONGER CLUTE.  
CHARLES OAKES ZACHARUS ERMATINGER.  
No. 1275. NATHANIEL F. HAGLE.

The above names are given as on the roll, and not in order of merit.

And the following gentlemen received Certificates of Fitness:

- |                              |                             |
|------------------------------|-----------------------------|
| MAXWELL D. FRASER.           | } Without oral examination. |
| GEORGE B. GORDON.            |                             |
| HANMEL MADDEN DEROGHE.       |                             |
| CHARLES E. BARBER.           |                             |
| EDWARD HARRY D. HALL.        |                             |
| KENNETH MACLEAN.             |                             |
| CHARLES OAKES Z. ERMATINGER. |                             |
| HENRY THEOPHILUS W. ELLIS.   |                             |
| CHARLES BAGOT JACKSON.       |                             |

And on Tuesday, the 18th November, the following gentlemen were admitted into the Society as Students of the Laws:

*University Class.*

- RICHARD W. H. N. DAWSON.  
JOHN E. K. GOURLAY.  
F. M. MORSON.  
ROBERT SHAW.  
WILLIAM H. CULVER.  
FRANK S. NUGENT.  
ROBERT E. WOOD.  
JOHN L. WHITING.  
WALTER BARWICK.  
FRANCIS MADILL.  
ALEXANDER C. GALT.  
JAMES H. MADDEN.  
PETER L. PALMER.  
CHARLES L. FERGUSON.  
RICHARD P. PALMER.  
ALBERT A. F. WOOD.

*Junior Class.*

- TRAVELMAN RIDOUT.  
JAMES V. TRETHEL.  
JOHN ALEXANDER PALMER.  
HARRY DUDLEY GAMBLER.  
GEORGE EDGAR MILLAR.  
LORENZO UDOLPHUS C. TITUS.  
RALPH WINNINGTON KEMPER.  
OLIVER RICHARD MACLEAN.  
JAMES NORRIS WADDELL.  
JAMES RYMAL.  
HENRY RYERSON HARDY.  
ROBERT CONOLLY MILLER.  
E. SYDNEY SMITH.

*Ordered*, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, *Pro Milone*. (Mathematic) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 13), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. 1, Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Outhrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
Treasurer.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR MARCH.

1. SUN... *2nd Sunday in Lent.*
2. Tues... Last day for notice of trial for County Court, York.
6. Fri... Name of York changed to Toronto, 1834.
7. Sat... Last day for Local Clerks' return under Mun. Act. s. 199.
8. SUN... *3rd Sunday in Lent.*
10. Tues... Gen. Sess. & Co. Ct. York beg. Last d. for J. P.'s to ret. conv. to Clk. of Peace (32 V. (Ont.) c. 6, s. 9; 33-35 V. c. 31, s. 76; 33 V. c. 27, s. 8). Prince of Wales married, 1863.
12. Thurs. Irish Union Bill defeated; Gladstone resigns, 1873.
15. SUN... *4th Sunday in Lent.*
17. Tues... *St. Patrick's Day.*
19. Thurs. Insurrection of Parliament Troops, 1871.
20. Fri... Flight of Napoleon III. to Dover, 1871.
21. Sat... Princess Louise married, 1871.
22. SUN... *Passion Sunday.*
25. Wed... *Annunciation.*
27. Fri... American Civil War commenced, 1861.
29. SUN... *Palm Sunday.* Cambridge wins Univ. Boat Race, 1873.
31. Tues... Last day for return by Local Clerks under s. 191-2 of Mun. Act.

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THE  
Canada Law Journal.

Toronto, March, 1874.

In a case reported in the *Central Law Journal*, St. Louis, of Nov. 1873, upon the question as to the validity of Railway Aid Bonds, it was held by the Supreme Court of Kansas that the law did not authorize the submission to a single vote of the question of subscribing stock and issuing bonds to two or more corporations. The question of making the subscription to each corporation must be submitted separately to the electors.

The exercise of the power to punish for contempt of Court is fast approaching the region of comedy. It appears, says the *Solicitors' Journal*, that the unfortunate gasman who rules the lights in Westminster Hall was brought before that Court whose justices are, in the language of Lord Coke, "the sovereign justices of Oyer and Terminer, gaol delivery, conservators of the peace, &c., in the realm," and solemnly informed that to dazzle the eyes of the judge by turning on too strong a light would be deemed contempt of Court. The Judge who fulminated was Blackburn, J. The reason of the glâre, as explained by the terror-stricken official, arose from the demand in the Divorce Court for "more light."

## LAWYERS' FEES.

We do not propose now to discuss the wisdom of the present system of making unfortunate litigants contribute such enormous sums as they do to the coffers of the country, nor to enlarge upon the odium attaching to lawyers for the large fees they are *supposed* to receive for services rendered, but we desire to state a few facts touching the latter sub-



## EDITORIAL ITEMS—ADMINISTRATION OF JUSTICE ACT.

ject which may interest some of our readers.

There may be those who have taken the trouble to estimate the extent to which attorneys and solicitors are the collecting agents for the public treasury, sheriffs, clerks of courts, witnesses, criers, &c. We would draw the attention of those who have not done so, to a recent return made to the Legislature of Ontario, by the Clerk of the Court of Queen's Bench. This return applies only to common law Suits; in Chancery proceedings it is even "more so."

The return we speak of gives an approximate estimate of the average sum paid in law stamps in each suit in the Court of Queen's Bench, as well as an approximate average of the percentage of disbursements in each bill of costs.

For the purpose of the return, Mr. Dalton averaged the costs upon forty judgments; twenty of which were entered upon verdicts, and twenty were judgments recovered at different stages of the suit before verdict. In all cases counsel fees were put down among fees to attorney, and not as disbursements.

The full amount of costs was \$3013.64. The disbursements to sheriffs, witnesses, postage, &c., other than stamps, \$798.82. Disbursements in stamps, \$281.16. Upon this result, therefore, it appeared: (1) that the average sum paid in law stamps in each suit was \$7; and (2) that on the average nearly 36 per cent. of such bills of costs was disbursements. The average of disbursements would have been increased if a proper proportion of counsel fees were added to the disbursement column.

The large increase to the fees to Sheriffs, Clerks of County Courts, &c., which has been recently made, will make the percentage of disbursements much larger. It may, with reference to these officers, be advisable to discuss at some future time the propriety of the adoption of some

scheme, different from the present one, for remunerating them

### ADMINISTRATION OF JUSTICE ACT—CHANGES IN PRO- CEDURE.

It is, of course, impossible to predict what will be the course of practice and procedure in the Superior Courts of Law and Equity, whether ultimately the rules which obtain in Courts of Equity will prevail over those of the Common Law, or *vice versa*. It is manifestly desirable that there should be, as far as possible, and as soon as possible, mutual modifications of practice between the Courts of Law and Equity, so that the systems may, while approximating, be made to work harmoniously together, as auxiliary the one to the other. We doubt not that the Judges of the Common Law Courts will be ready in matters of procedure to adopt the language of Blackburn, J., when he says "We are not bound to follow the rules of the Courts of Equity, but if we saw that their principle was sound and just, we should apply it:" *Elkin v. Clarke*, 21 W.R. 447. And so the Chancery Judges will be willing to avail themselves of the rules and practice of Common Law Courts in matters which have hitherto fallen exclusively within the jurisdiction of the latter. The best conceivable thing to be done at the outset, in dealing with the new state of affairs introduced by the Administration of Justice Act, would be for the Judges to unite in framing a comprehensive set of rules or orders for determining the course of procedure under this Act. But so multifarious are the judicial duties, and so great is the pressure of every-day work, that it is well-nigh impossible to secure the requisite leisure for such an undertaking, and so in all likelihood things will be left pretty much to shape their own course. Out of the disorder, no doubt, a system

## ADMINISTRATION OF JUSTICE ACT—CHANGES IN PROCEDURE.

of procedure will in due course of time become formulated by the decisions of the Judges. Meanwhile there are some probabilities as to the effect of the Act in question upon some branches of the law, which we propose briefly to consider.

And first, as to demurrers in Equity for multifariousness, the practice will be somewhat altered. This objection is one which must be taken by demurrer; otherwise, if passed over, so that the cause comes to a hearing, the Court will administer appropriate relief. The objection for multifariousness generally is open to the defendant, when upon the record distinct matters are united, which it would be inconvenient and undesirable for the Court to try at the same time. In *Loucks v. Loucks*, 12 Gr. 343, Spragge, V. C. remarked (adopting the language of Lord Cottenham)—“To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible.” But he goes on to say, “It is a just ground of complaint with the demurring defendants, that distinct matters, wholly unconnected, in which they have no interest, are united in the same record with the case they have to answer.” Now, according to the former practice, the objection would not be good on demurrer if the multifarious matters united were such as could only be cognizable at law, and in respect of which there was not jurisdiction in Equity. Thus it is laid down in Story's Equity Pleadings, section 283, referring to *Knye v. Moore*, 1 Sim. & Stu., 61. “If one of the distinct subject matters be clearly without the jurisdiction of a Court of Equity for redress, it seems that the Court will treat the bill as if it were single, and proceed with the other matter, over which it has jurisdiction, as if it constituted the sole object of the bill.”

But the effect of the 32nd section of the Administration of Justice Act, giving Equity jurisdiction in Common Law matters, will alter the law in this respect, so that the demurrer for multifariousness in such a case as *Knye v. Moore* (*supra*), would be probably upheld.

Again, a very important advance in the administration of the law was made in this Province by Strong, V. C., when he decided in *Longeway v. Mitchell*, 17 Gr. 190, that the beneficial provisions of the statute 13 Eliz. cap. 5, were open to all creditors. Before this decision, the rule was to refuse relief to a creditor seeking to avoid a fraudulent conveyance made by his debtor, unless the person seeking relief had obtained a judgment and execution at law. But, as the Vice Chancellor observed, “if a simple creditor could not maintain such a bill, he might be entirely defeated by a conveyance by the fraudulent grantee to a *bona fide* purchaser, whilst the action at law, in which he seeks to recover his judgment, is actually in progress.” Now under the provisions of the same 32nd section it seems to us that a creditor seeking to impeach a fraudulent conveyance, could proceed concurrently, and by one and the same suit in equity, to establish his right as a creditor by the decree of the Court, (which would be equivalent to a judgment at law,) and also to have it declared, in a proper case, that the conveyance impeached was fraudulent and void as against his claim. In cases such as *Longeway v. Mitchell*, the Court did not heretofore order the land to be sold for the satisfaction of the creditor, because not having his execution in the Sheriff's hands, the Court would not expedite the sale of the lands. Yet we think under the new Act, this relief by way of sale of lands could be worked out in such a suit by an ordinary creditor, whose rights as a creditor are established by a decree for the payment of the debt.

## ATTACHMENT OF DEBTS IN DIVISION COURTS.

**ATTACHMENT OF DEBTS IN  
DIVISION COURTS.**

The Member for London has introduced in the Provincial Legislature, a Bill proposing to limit the right of attaching debts by exempting the wages of workmen and labourers from liability to seizure, to satisfy creditors. Since the passing of the Act of 1868-9, respecting Division Courts, the right to garnishee debts has been found an efficacious means in the hands of creditors for recovering small sums which thousands of dishonest debtors previously contracted and kept beyond their reach. The right extends to "any debt due or owing to the debtor from any other party." We do not, for a moment, question the *bona fides* of the motives which have suggested the proposed legislation, but it would be idle to deny that there have been those who have evinced a morbid desire to pander to ignorance and sympathise with the *poor debtor*, to the total disregard of the rights and privileges of the *poor creditor*.

It may be that this Bill will not go beyond a second reading. But in the possibility of the law on this subject undergoing change, it is proper for us to refer to decisions that have been made under the Act, which, if not correct expositions of the intention of the Legislature, ought to be placed beyond doubt by an amending statute. It has been held that the costs of a primary creditor cannot be recovered against a garnishee unless the garnishee disputes the debt claimed,—that so much of the debt attached and no more than will satisfy "the claim" and "to the extent of the primary debtor's claim" only—can be held liable, that the Act provides nothing for costs, that the proceeding interposes an authority for forcing away from a primary debtor a chose in action which he, and he only, can dispose of and control, and that any sum which is not taken from him by the force of this

statute, is still vested in himself; the Act only providing a discharge for so much; so that for any sum which is not legally attached the garnishee is still liable to be sued by the primary debtor; for that can only be legally attached which the statute says shall be, and all the rest the garnishee must pay to the primary debtor, and that whatever may not be legally recovered by this proceeding of garnishment may be recovered by some other. Without committing ourselves to any particular opinion on this subject, we may mention that the question was brought before the County Judges at their last meeting, and as we have stated in a previous number, a paper was read maintaining this view with some conclusiveness and force. The large majority of those present concurred in it, so that if the intention of the Legislature was really to enable primary creditors to recover costs in cases where the fund in the hands of garnishees will admit of it, the statute should be amended in order to prevent hardship, and thereby make this very useful provision more efficient than it is at present in counties where Judges hold the view we have mentioned.

Another question has been mooted which is of some consequence to creditors to consider, particularly if proceedings by garnishment are to be taken at their own costs and charges; and it is this: by sub-section 4 of section 6, it is enacted that "whether any such attaching order shall or shall not have been made the primary creditor" &c., may summon the garnishee in the form D in the schedule. A reference to the form shews that the clerk issues the summons—which is to be served on the garnishee; section 9 gives the same effect to the issuing and serving of that summons as is given by the 2nd sub-section of section 6; the question has arisen what is the need or use with this provision of applying to the Judge on affidavit

## ATTACHMENT OF DEBTS IN DIVISION COURTS.

for, an attaching order under the first sub-section of section 6. The question has been answered in this way by some of those Judges who have given time and thought to its consideration; the affidavit required under the first sub-section of section 6, shews (1st) the recovery of a judgment and when; (2nd) that some one or more parties is or are within the Province, and is or are indebted to the primary debtor, &c.; then the attaching order issues, the service of which has the effect of attaching and binding all debts due to the primary debtor. This section and the form C in the schedule shew the intention of the Legislature to have been that all debts owing to the primary debtor from any party in the Province should be attached and bound to the extent unsatisfied on the judgment, and a payment by a garnishee into Court, or to the primary creditor, of the debt attached is declared to be a discharge to the extent of the debt owing from the garnishee to the primary debtor. The attaching order may be served and is binding in any county. The summons issued by the clerk, to be effectual under sub-section 4, can only be legally issued from a Division Court, and can only be served in the Division in which the garnishee resides or carries on business, and can only include one garnishee on a separate or two or more garnishees on a joint debt; whilst the attaching order of the Judge binds *all debts*, (all over the Province) due by all such parties, whether such debts are joint or several debts or not. The summons by the clerk calls the garnishee before the Court to answer the claim and state whether he owe any and what debt to the primary debtor, and why he should not pay it to satisfy the judgment. The order by the Judge merely attaches the debt, and must if necessary be followed up by the primary creditor by subsequent proceedings in the proper Division Court, in any and every

county where garnishees reside or carry on business, until his judgment is satisfied; so that if there be only one debt to attach or if the garnishees are all within the jurisdiction of the Division Court issuing the process, a Judge's attaching order may be dispensed with by issuing a summons for each garnishee.

This, we have no doubt, will present a new view of this interesting subject to many of our readers, but those introductory words of sub-section 4, "*Whether any such attaching order shall or shall not have been made,*" lead us strongly to the conclusion, that the view taken by some of our most experienced County Judges to whom we allude is correct, and if there be doubt upon it, it should be settled by the Legislature now in session.

There exists a contrariety of practices under section 7, "when the primary creditor's claim is not a judgment," arising from a difference of opinion as to whether a summons issued in the proper Division, as to the garnishee, can properly cite a primary debtor to a Court other than which would have jurisdiction, supposing the proceedings were an ordinary suit for the recovery of the same debt; this contrariety should be set at rest by legal enactment. The 7th section provides with certainty for the case of the garnishee; he must be summoned to the Court in the Division in which he lives or carries on business; nothing whatever is laid down as to the primary debtor, excepting that, if practicable, the summons must be served on him unless the Judge shall, for sufficient reason, dispense therewith. The question here arises, have the rights of an ordinary defendant been taken away from the primary debtor on the mere allegation and for the convenience and advantage of a primary creditor? We think not, and that a Judge could not for any reason of such mere convenience of the creditor and garnishee, dispense with service, but

## ATTACHMENT OF DEBTS IN DIVISION COURTS—JUSTICE SHALLOW.

should insist on its being made in every case which requires personal service in ordinary cases—if practicable; if the primary debtor has been duly served with summons, judgment may be given against him; if he has not been “duly served” section 12 specially provides that no judgment can be rendered against him “until the summons and memorandum with an affidavit of the due service of both be filed, unless the Judge, for special reasons, shall otherwise order. What, it has been asked, is due service within the meaning of this section? There is no express provision explaining it, in the Act of 1868-9, it is therefore argued that it cannot be left to inference or conjecture, but resort must be had to the practice on the subject which existed previously. By section 21 of the Act in question, “The Division Courts Act and this Act” are to be read as one Act. Con. Stat. U. C. sec. 71 prescribes that “the suit may be entered and tried in the Court holden for the Division in which the cause of action arose or in which the defendant, or any one of the defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant or defendants may at such time reside in a County or Division different from the one in which the cause of action arose.” There were other previous special provisions with reference to the Courts in which suits may be entered and tried—and with the exception of these, we do not quite see how a primary debtor can be legally summoned to a Court, or how any Court has jurisdiction over a cause of action against him, other than that which is prescribed by the statutes existing previously to the statute of 1868-9. It is contended by some who have studied the question, that the primary debtor may be summoned to the Division Court of the Division in which the garnishee may be summoned, although that may cause him to go to a distant

County for the purpose, no matter at what inconvenience to him personally, to say nothing of injustice where he has a meritorious defence to claim, possibly “trumped up” against him, and which he must defend at great expense. Others, on the contrary, contend that when the primary debtor and garnishee are not both legally amenable to the jurisdiction of the same Court, the primary creditor should first obtain a judgment against the primary debtor and then proceed against a garnishee under section 6. As the Act of 1868-9 was clearly intended to meet either case and both cases, it is urged that it must be read in consistency with the previously existing statutes. Hence it is desirable, if the principal features of this useful law are to be continued, that the practice under it should be better settled by the Legislature.

## JUSTICE SHALLOW.

“I am Robert Shallow, Sir, a poor Esquire of this county, and one of the King’s Justices of the Peace.”—*King Henry IV., Part 2.*

It is the popular impression that law would be a very simple matter if it were not for the lawyers. If “Common Sense” were only allowed its proper influence in the administration of Justice, law and justice might come to mean the same thing. Unhappily the lawyers have outwitted common sense, and hence the delays, the extortions and the failures of justice. Common sense, it is true, is not entirely denied the privilege of assisting justice, for juries and Justices of the Peace still exist; but how saddening it must be to the reflective layman to mark how these pillars of the constitution are being undermined by an aggressive Legislature. He knows how juries have been slighted and assailed. He will perceive a threat of danger to the Justices in that clause of the new Administration of

## JUSTICE SHALLOW.

Justice Act which dispenses with the presence of an "Associate or any other Justice of the Peace" at the Courts of General Sessions.

Though we cannot as lawyers be expected to entertain any great reverence for common sense, we cheerfully admit the great services of Her Majesty's Justices of the Peace. Sir Edward Coke said, "The whole Christian world hath not the like office as Justice of the Peace, *if duly executed*." Common sense alone does not insure its being "duly executed," but we must not look for perfection in human beings, and it is unfair to expect that a man, largely gifted with common sense, should possess other rare qualities.

In this country at least, if the Squire makes mistakes, they are generally harmless: they are more often of the head than the heart. He may be ignorant, but he is not usually despotic: he moves us to laughter more often than to anger.

And we may laugh at him as much as we will, for the law, probably in her antagonism to common sense, if she does not actually encourage us, secretly joins in the laugh against her much abused minister. For instance, we read with pain that, in the time of Holt, an irreverent person wrote of Sir Rowland Gwyn, who was a J.P., in a discourse concerning a warrant made by him, "Sir Rowland Gwyn is a fool, an ass and a coxcomb for making such a warrant, and he knows no more than a stick-bill." And this slanderer was neither hanged nor imprisoned, nor put in the stocks, but went scot-free. "To say a Justice is a fool," said Holt, C. J., "or an ass, or a coxcomb, or a blockhead, or buffle-head, is not actionable." 2 Salk. 688. And you may with confidence tell a Justice of the Peace that he is "an ass and a beetle-headed Justice," and, if he expostulates, cite Holt again to his discomfiture, and you may do this "because

a man cannot help his want of ability, as he may his want of honesty: otherwise where words impute dishonesty or corruption:" 2 Salk. 695. It is satisfactory to know how far the law allows us to go in expressing contempt for a magistrate who obstinately refuses to accept our views. What balm it would afford to the wounded feelings to intimate to such a one, when he has descended from the bench, "Sir you are an ass, a coxcomb, and a buffle-head, and C. J. Holt says I may tell you so." Whether it is becoming, or just, to treat our magistrates with levity, we will not here discuss. It is simply our wish to note down some thoughts suggested by reading of two famous and typical Justices, the name of one of whom heads this article. If any living Justice shall profit by what we write, shall learn something to avoid and something to emulate, shall be lifted up to a higher and holier sense of his duties,—we shall be surprised, but gratified.

Some 300 years ago there lived a Justice in Warwickshire named Sir Thomas Lucy, whom accident and a severe temper have immortalized. There was a difference of opinion between the good people of those parts and Sir Thomas, as to which of them had the best right to the deer in the park of the latter. Sir Thomas strongly favoured his own title, and having magisterial authority to support it, prosecuted trespassers on his lands without mercy. It is said that amongst the mad fellows who broke his fences and the heads of his keepers and stole his deer, was a Master Will Shakespere. He offended this young man mortally by his arrogance and severity, and the consequence is that Sir Thomas Lucy, who would otherwise have been gathered to his fathers and forgotten, has come down to posterity in the person of Justice Shallow.

Perhaps if we had to find a generic

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name under which to classify Justices of the Peace, we could not get a more convenient one than Shallow. Not that Justice Shallow presides in the inferior courts alone. Arbitrary monarchs have found it profitable to honour him with the highest judicial position in England. We would not venture to say that there is no colonial bench on which he may be found. He was well known in Ireland in the troubled times just before and after the union. "I rather think," said an Irish Shallow, solemnly thinking out the construction of a will, "I rather think the testator meant to retain in himself a *life estate*." "Oh, my Lord," said Curran, "Your Lordship must be taking *the will for the deed*."

It was Squire Shallow who lately decided that a verbal contract required a stamp. It was also Squire Shallow before whom a "sharp" lawyer won his case, in spite of an authority directly against him, cited from Greenleaf on Evidence. The lawyer insisted that Greenleaf was not intended as "an authority," and in support of his assertion read the following passage from the preface:

"Doubtless a happier selection of these principles might be made, and the work might have been much better executed by another hand. For, now it is finished, I find it but an approximation toward what was originally desired. But in the hope that it may still be found not useless, it is submitted to the candour of a liberal profession."

To return to the original Shallow: we are introduced to him (in Henry IV., Pt. 2) at his house in Gloucestershire, where, with his cousin Justice Silence, he is expecting Sir John Falstaff, who is going about the country on a recruiting expedition. Shallow is a garrulous old donkey. He has a mind of the "glutiously indefinite" sort, like that worthy modern magistrate Mr. Brook of Middlemarch, and like him rambles hopelessly in conversation. He interrupts his re-

flections on the uncertainty of human life with an inquiry as to the price of bullocks at Stamford fair, and from that passes, with cheerful irrelevance, to the days of his youth. In his youthful days, of which he is very proud, he lost the magisterial quality of common sense, if he ever had it, for he studied the laws, as the sons of country gentlemen in that age often did. He himself informs us:

"I was once of Clement's Inn, where I think they will talk of mad Shallow yet.

SILENCE—You were called "*Lusty Shallow*" then, cousin.

SHALLOW—By the mass, I was called anything, and I would have done anything indeed, and roundly too. . . . Then was Jack Falstaff, now Sir John, a boy and page to Thomas Mowbray, Duke of Norfolk.

SILENCE—This Sir John, cousin, that comes hither anon about soldiers.

SHALLOW—The same Sir John, the very same. I saw him break Skogan's head at the court gate . . . and the same day did I fight with one Sampson Stockfish, a fruiterer, behind Grey's Inn. Oh the mad days that I have spent!"

An edifying glimpse, truly, of the life of the "sad apprentice of the law" in the days of Queen Bess, for of course the poet describes the manners of his own age. We know from historical sources that the students of the Inns of Court did not lead a very sedate life. They gave as much of their time to the fencing-school and the play-house, as to the discussion of 'moots.' They cultivated a taste for beating watchmen and other boisterous sports, from which the refined and industrious law-student of the present day would shrink with abhorrence. When in the mood for a particularly inspiring lark, they playfully took the road and relieved helpless travellers of their purses. This may seem incredible, but it is well authenticated that one of the ablest and most upright Judges of that day was in his youth one of a band of amateur highwaymen. Happily he conceived a distaste for this business

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in good time, exchanged his pistols for his law books, and rose to eminence in his profession, and when he became Chief Justice of the Queen's Bench, it was observed that gentlemen of the road found no mercy at the hands of Chief Justice Popham.

Here, for the present, we must take leave of Justice Shallow. We may have something more to say about him, when we come to speak, as we hope to do, of his worthy colleague Justice Silence.

## SELECTIONS.

*THE YEAR 1873 IN ENGLAND.*

The year which has just closed was a remarkable year from a legal point of view. The judicial system which has been the growth of centuries—the great division between equity, the offspring in its recent developments of the power arrogated to themselves by successive lord chancellors, and law, the creature of custom and statute extended and explained by judicial decision—has been swept away by the strong hand and overwhelming influence of a lord chancellor who accomplished his reform while still a novice in his high office. The profession and the public during the last twenty years had welcomed small innovations in the respective jurisdictions, the introduction of common-law remedies into chancery, and of equitable defences into common law, without venturing to contemplate the fusion of equity and law. And perhaps the most remarkable circumstance connected with the great measure of reform which will render ever memorable in our legal history the year 1873, is that it does not on its face enact a fusion of two branches of jurisprudence. Its noble and learned author foresaw that if he were to propose to merge the courts and shuffle the judges together, and submit all questions upon our different laws to courts so merged, there would be an outcry based on reason which might imperil the success of the measure. With a prudence which many chancellors of perhaps a higher order of genius than Lord Selborne have lacked, he preserved existing courts and their judges, keeping the courts distinct even in their

nomenclature, and providing for the business to run almost precisely in the groves in which it has run hitherto.

We feel that when the magnitude of the Judicature Act is regarded, all other measures sink into comparative insignificance. At any other time the Railway and Canal Traffic Act, which took away an important jurisdiction from a common-law court, and gave it to commissioners, would have been looked upon as a very important measure—much as the Election Petitions Act of 1868 was considered, seeing that it took from the House of Commons the exercise of important judicial functions, and transferred it to the common-law judges. And the act of this year is undoubtedly one of great moment, as it seems to facilitate the redress of grievances alleged by and against the great carrying companies of this country. The general legislation of the session we have already noticed in these columns, and we do not propose to carry our readers over the ground again.

Next in importance to the great change in the judicial system of this country is the operation of death and promotion in the ranks of the judges and the Bar. The death roll for this year exhibits the names of men who could ill be spared. One of the greatest lawyers England ever saw was lost to our court of ultimate appeal in the person of Lord Westbury. The Court of Chancery had scarcely been adorned by the elevation of Sir John Wickens, one of the most scholarly, accomplished and able men of his generation, before illness incapacitated him to perform the duties of his office, and in a short time terminated fatally. The Court of Common Pleas lost its Chief Justice, who, while more distinguished at the Bar than on the Bench, was a painstaking and conscientious judge, and particularly capable in presiding over his court at Guildhall, which, at the time of his appointment, was a favourite tribunal for the trial of heavy commercial causes. The Court of Exchequer sustained a serious loss in the retirement of Baron Channell, who died shortly after. An Irish Judge of eminence, Chief Baron Pigot, died at the close of the year; and this completes the list of our judicial losses. Dr. Lushington, for a long period Judge of the Court of Admiralty, died during the year, but he had previously



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retired from all judicial duties. The other lawyers of position or note abroad and at home, who must be named as having been lost to us, are: Chief Justice Chase (of the United States), Mr. T. Chisholm Anstey, the Hon. Sir George Rose (ex-Judge of the Court of Review), Mr. Thomas Tomlinson, Q. C., Mr. James R. Hope-Scott, Q. C., Mr. T. H. Hadson, Sir Wm. Alexander, attorney-general to the Prince of Wales; Mr. Serjeant Bellasis, Mr. Serjeant O'Brien, Mr. Edward Masson (formerly attorney-general for Greece), Mr. Dominick McCausland, Q. C., Mr. Edmund Fitz-Moor, Q. C., and the Hon. William Jardine, Judge of the High Court of the Northwestern Provinces of India.

The changes in the Bench and Bar by promotion have been gradual, but in one sense remarkable. When we say gradual, we intend to indicate that Government has not made any appointment until the very last moment. By the retirement of Lord Romilly from the Mastership of the Rolls it became necessary to appoint a successor. With some motive, never thoroughly comprehended by the profession and the public, Lord Selborne assumed the functions of a judge of first instance, and transacted, for a considerable period, the business of the court. At length Sir George Jessel was appointed, thereby, although not necessarily, removing from the House of Commons a politician having little influence as a law officer, and who had particularly distinguished himself as the uncompromising opponent of reform in legal education. The Rolls Court proved to be for him a congenial sphere, and the appointment was universally acknowledged the only one which could properly be made. On the retirement of Baron Channell, Mr. Pollock, Q. C., was raised to the Bench in the Court of Exchequer; and the death of Vice-Chancellor Wickens made an opening on the Equity Bench to which the stuffgownsmen in the largest practice at the Equity Bar was promoted, and Sir Charles Hall has proved himself to be a capable judge.

The promotion of Sir George Jessel vacated the office of Solicitor-General, to which, after considerable delay, as usual, a member of the Bar and the House of Commons who had distinguished himself for his ability and independence, was

selected, in the person of Mr. Henry James. The Government having sustained a succession of reverses in the constituencies, the re-election of their solicitor became a matter of vital importance, and rarely has the contest on the re-election of a law officer proved so exciting. The solicitor was re-elected, but when the year closed the return was still threatened by petition. Within a few weeks of Mr. James' appointment and re-election, the attorney-general (Sir John Coleridge) was raised to the vacancy created by the death of Chief Justice Bovil, and Mr. James became attorney-general. This rapid rise of one whose reputation at the Bar had not been of the highest order, but who had been known as a shrewd lawyer and clever speaker, is perhaps unparalleled, and deserves a prominent position in the facts of the year. The solicitor-generalship vacated by him was filled by the appointment of Mr. Vernon Harcourt, an accomplished debator but not a practical lawyer. Sir John Coleridge, soon after his elevation to the Bench, was further elevated to the House of Lords, to which assembly he will add judicial strength for the remaining period that it will be required, and debating power of an essentially aristocratic order.

The business transacted in our courts has been such as to call for little observation. In the Queen's Bench a trial at bar has been in progress for more than half the year, keeping at work all the long vacation three learned judges and a strong bar. The case which has occupied the attention of the court is in itself extraordinary, but it has been embellished with forensic asperity and impudence which will make it a subject of curiosity and wonder to coming generations. The case will further be considered as proving the extremely useful purpose which is served by our system of trial by jury, for twelve men have evinced an amount of intelligence and practical knowledge which has done much to facilitate the just determination of the most gigantic prosecution which has ever encumbered a court of law.

It must be considered that, speaking generally, the legal business in the country has declined, whilst, we believe, both branches of the profession have considerably added to their numbers. Vigorous measures have been taken during

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the year by the solicitors to improve the Incorporated Law Society and to bring within it, or into action with it, the important law societies of the provinces. The agitation for improved legal education, which lay dormant during the passage of the Judicature Act, was revived by a deputation to the Lord Chancellor at the close of the year, and promises to lead to legislative action with reference to the Inns of Court.—*Law Times*.

## MERCANTILE AGENCIES.

The most important question with regard to mercantile agencies is as to how far their communications made to their patrons and customers and affecting the credit and commercial standing of others are to be regarded as privileged communications. However useful these agencies may be to traders and merchants when properly conducted—and that they are useful there can be little question—they may yet, if recklessly and dishonestly managed, become engines of great evil, and sources of great injury to the wealthiest and most solvent business men of the country.

As these agencies are an outgrowth of modern times, there are but few cases to be found in the reports relating particularly to them, but it is believed that enough may be found to settle, pretty clearly, the extent of their rights and liabilities in the matter of communicating information.

The earliest case bearing upon the subject is that of *Goldstein v. Foss*, 2 Carr & Payne, 252 (1826). The facts were these: A society had been formed, called "The Society for the Protection of Trade against Swindlers and Sharpers," into which all fair traders were admissible. It was the duty of defendant, its secretary, to ascertain and designate to the members, the names of such persons as were deemed improper persons to be balloted for as members. The libel complained of was a communication addressed to the members of the society, in which it was stated that the plaintiff was reported to this society as improper to be proposed to be balloted for as member thereof. Lord Tenterden told the jury that there could be no doubt that such a communication was libelous, and the jury gave a verdict for plaintiff.

The case of *Fleming v. Newton*, 1 H. L. Cas, 363 (1848), is, however, more nearly akin to the precise subject we have in hand. There the appellants were directors of a Scottish mercantile society, formed "to concentrate and bring together, from time to time, a body of information for the exclusive use of the members, relating to mercantile credit of the trading community, with a view of diminishing the hazards to which mercantile men were exposed. The rules required the secretary to collect from the public records of protests, etc., the names and designations of debtors in trade, etc., and to print his information and forward it monthly to each member of the society. The respondent had dishonoured two notes, and procured an interdict against the publication of the protests by the appellants. The laws of Scotland required all protests to be registered in a public register, and it was conceded that the extracts complained of were taken from this record, and were made for a limited purpose, and for the use of the society. The House of Lords dismissed the interdict. In the course of the judgment the Lord Chancellor spoke as follows: "They (the society) are engaged in mercantile affairs in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register, is not disputed, and that they might communicate to each other what they had found there, is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter is a libel, this is a publication of it; but the transaction disproves any malice and shows a legitimate object for the act done." The turning point in this case was probably the fact that the matter claimed to be libelous was copied from a public record.

The earliest case in this country, so far as we have been able to ascertain, was that of *Billings v. Russell*, 8 Boston Law Reporter, 699, tried before Dewey, J., at Nisi Prius. The plaintiff was a merchant, and the defendant the proprietor of the "*Boston Mercantile Agency*." The defendant had received from his agent, on what was supposed to be reliable at-

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thority, a report injurious to the credit of the plaintiff. This report had been read by defendant's clerks to regular subscribers to defendant's agency, who were interested in knowing the standing of the plaintiff. The report was incorrect and unjust. The Court charged that if defendant, as the constituted agent of a commercial house, upon the application of his principal, made inquiries at the proper places, and under proper and reasonable guards to insure accuracy and privacy as to the information thus obtained, and the information which he thus obtained was repeated *bona fide* to his employer, and to him alone, as the result of such inquiries, and for the purpose of governing his conduct in his business transactions with the party as to whom the inquiry was made, such communication may be justifiable as a confidential communication, and the defendant would not be responsible although the information was incorrect and unfounded in fact, the defendant acting in good faith and believing it to be true at the time he communicated it, but that the privilege of a confidential communication would be confined to the agent, and if the principal repeated it to others he would be responsible.

In *Taylor v. Church*, 8 N. Y. 452 (1853), the question was fully discussed before the Court of Appeals of this State. Several mercantile firms of the city of New York associated together, and employed the defendant to travel in the southern and western States, to obtain information in relation to the standing of merchants and traders residing there. The information obtained was transmitted in the form of a report to one of the associated firms, and by them printed, and a copy sent to each member of the association. The defendant having made a report unfavourable to the credit and standing of the defendant, a merchant in Mississippi, which report was circulated in the usual manner, the plaintiff brought an action for libel and recovered judgment, which being affirmed by the Court in banc, an appeal was taken to the Court of Appeals. The judgment was reversed on the ground of improper rejection of evidence; but on the question of libel or no libel, Jewett, J., who delivered the opinion, said: "I think the Court below was right in holding that the pub-

lication could not be included within the protection of privileged communications. In this case the communication was not even confined to persons making the inquiries of the defendant. The libel complained of was printed by his procurement, and distributed by him to persons who had no special interest in being informed of the condition of the plaintiff's firm." This was all that was said on this point. But on the question being propounded to the Court—"Was the alleged libel a privileged communication?" all the members of the Court who heard the argument were of opinion that it was not.

This decision must rest solely upon the ground that the information claimed to be libelous was communicated to persons other than those who had a direct and special interest in it, and, as we shall see, it is an authority for nothing beyond that.

*Ormsby v. Douglass*, 37 N. Y. 477 (1868), was an action of slander against the owner of a mercantile agency in New York. By the terms of the subscription to this agency—which constituted the contract between the defendant and the person to whom the alleged slanderous words were uttered—all information was to be considered strictly confidential and furnished only for the use of subscribers. One Benton, a subscriber, holding a note indorsed by the plaintiff, applied to the defendant for information as to his credit, responsibility, etc. The books of the agency were consulted by the clerks, and the result communicated to the defendant, who thereupon informed Benton that plaintiff was "a man of no responsibility; he was a bad man and worked for counterfeiters, and was a counterfeiter." On the trial, a non-suit was granted on the ground that the communication was confidential and privileged. This judgment the court of appeals affirmed, on the ground that the words were communicated by the defendant in the performance of a duty imposed upon him, to a person who had an interest in the matter, and who had a right to require the information. This decision is in accordance with the rule so well stated by Parke, B., in *Toogood v. Spryling*, 1 Comp. M. & R. 143—and which has been since universally approved—that a communication is privileged, if fairly made, by a person in the discharge of some public or private duty, whether

## MERCANTILE AGENCIES—ASSURANCE ON LIFE OF HUSBAND.

legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.

The doctrine laid down in *Taylor v. Church*, that communications derogatory to the credit or standing of another were not privileged if made to those who had no special interest therein, was re-asserted in *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322. In that case the defendant had a commercial agency, and distributed to his subscribers, semi-annually, 10,000 copies of a publication giving the credit and standing of merchants. He also issued a weekly sheet of "corrections," which was sent to all subscribers to the semi-annual publication, and which contained the alleged libelous matter—to wit, that the plaintiffs had failed—which was false. The defendant appealed from a judgment against him, and the judgment was affirmed for the reason above stated. The court said: Whether a libel or slander is within the protection accorded to privileged communications, depends upon the occasion of the publication or utterance as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged, if volunteered, when the party to whom the communication is made has an interest in it; and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information." Precisely the same conclusion, and on the same grounds, was reached in *Commonwealth v. Stacey*, 3 Phil. Leg. Gaz. 13, which was an indictment for an alleged libel contained in the circular of a commercial agency.

It follows, then, from these decisions, that a communication from a commercial agency to a subscriber is privileged, provided the subscriber have a special interest in the particular information communicated, but that if the communication be published to all subscribers, whether having a special interest in it or not, it is not privileged, and if defamatory, may be made the subject for an action.—*Pittsburgh Legal Journal*.

## ASSURANCE ON LIFE OF HUSBAND FOR BENEFIT OF WIFE.

In *Brossard v. Marsouin*, in the superior court at Montreal, October 21, 1873, before Beaudry, J., a question was ruled which appears to be novel and worthy of note, although the court is not one of last resort. The defendant, a public trader, holding her goods apart from those of her husband, effected a policy of assurance upon his life in the sum of \$1500, which sum was stipulated to be paid to her in the event of his death. The husband having died, and the defendant becoming embarrassed, one of her principal creditors forced her into bankruptcy. The defendant put the assignee in possession of all her goods, but refused to surrender to him the policy of assurance. The assignee filed his petition asking that she be compelled to deliver the policy as a part of the estate of the bankruptcy belonging to the creditors. The defendant responded that the provincial statute, 29 Vict., ch. 17, which authorizes similar assurances, provides that the amount shall be paid in the manner directed in the policy, and cannot be subjected by any creditor or creditors whatever. The assignee contended that the creditors mentioned in the Act are those of the husband, and not those of the wife; but the Court took the same view of the statute as did the defendant, and dismissed the petition with costs.

We do not recall any case similar to the above, and after a considerable search, have not been able to find any. In the case of *Murrin*, bankrupt, 2 Dillon C. C. 120; S. C. 2 Ins. Law Jour. 524, a wife possessed of a separate estate secured to her by an ante-nuptial settlement, obtained, in 1869, a policy of insurance upon her own life, payable upon her death to her husband. She paid the premium for a year out of her own estate. Before the year expired her husband was adjudged a bankrupt. Out of her own estate she paid the premium for the two following years, 1870 and 1871, and before the next premium fell due, she died; and it was held, in a contest between her husband and his assignee in bankruptcy, that the former was entitled to the proceeds.—*Central Law Journal*.

## PARENT AND CHILD.

## PARENT AND CHILD.

The question whether a father can, by contract, surrender his rights over his infant child, has recently been canvassed with seriousness, in the courts of Lower Canada, and has been finally answered in the negative, by the Queen's Bench at Montreal. We allude to the case of *Barlow v. Kennedy*, 17 L. C. Jurist, 253. Kennedy was a day laborer, in indigent circumstances. His wife died, leaving him a female child, the issue of their marriage, about eighteen months old. Both Kennedy and his deceased wife were Catholics, and the child had been christened in that faith. Unable to care for the child, he gave her to Barlow, a Protestant, in good circumstances, agreeing, by parol, that the latter should have her to rear, educate, and dispose of, during her minority, to all intents and purposes, as though she were his own. This contract was reduced to writing before a notary, which writing Kennedy agreed several times to sign, but failed or neglected to do so. Finally, Kennedy re-married; and, after Barlow had had the exclusive custody of the child for more than four years, in pursuance of the agreement, and without any compensation from Kennedy, the latter demanded that she be restored to him. This being refused, he sued out a writ of *habeas corpus* to recover possession of her. The Judge of the superior court having heard the case upon issues which he had caused to be made up, rendered the following judgment:

"The Court having heard the parties by their respective counsel, examined the proceedings of record and deliberated, considering that it is satisfactorily proved that petitioner, some three or four years ago, placed Mary Ann Margaret Kennedy, his infant child, under the care and guardianship of the respondent, William Barlow, and delegated his, said petitioner's right, authority and control over her person, under the express understanding and agreement that said respondent should bring her up and educate her as his own child; considering that said respondent then accepted the guardianship of said Mary Ann Margaret Kennedy, and has ever since, with great care and kindness, and at great expense, brought her up, according to the said understand-

ing and agreement, and desires to continue so to do; considering that it would be more conducive to the comfort, happiness and welfare of the said Mary Ann Margaret Kennedy to suffer her to remain under the care of said respondent, who and his wife have become much attached to her, and to whom she has also become much attached, than to consign her to the guardianship of the said petitioner, a poor day laborer, and a stepmother, to whom she is an entire stranger, doth dismiss the petition of said petitioner with costs, and remand said Mary Ann Margaret Kennedy to the guardianship and custody of the said respondent."

This judgment was removed to the Court of Review and there reversed; and the respondent having appealed to the Court of Queen's Bench, the judgment of the Court of Review was affirmed.

Badgley, J., of the Queen's Bench, said: "It is unnecessary to enter into detail of the right of a father to have the custody of his infant child: as a matter of justice and of law, the father requires no provision of law to secure to him that right, which no one can disturb or force from him, nor deprive him of, except on account of his own bad conduct or by his own consent. Except in the case of insanity, or some deliberate course of immorality or criminal act of his own, no father can forfeit or lose his paternal right, and even a contract by him to part with his child is so unnatural, that the law does not recognize a man's right to violate his most sacred duty, least of all to bind himself by a contract to do that which is inherently immoral and *ab initio* illegal, and in the eyes of the law null and void. Even, therefore, if a father had signed such a contract, it would not be binding, and he could still demand and have the custody of his child."

Monk, J., of the same court, said that the judgment of the court of first instance was an extraordinary one; and that it was monstrous to think that a father could divest himself of his right to his child.

The cases upon the subject of the right of a father to the custody of his infant child, and which determine under what circumstances a court of equity, or a court of law, in a proceeding by *habeas corpus*, will control that right for the benefit of the child, are very numerous.

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Their effect is very well shown by Mr. Schouler, in his work on the Domestic Relations, pp. 334, *et seq.* Contests of this character generally arise between husband and wife, in the event of separation or divorce; and there appear to be but few cases upon the precise point involved in the case above considered, namely, whether a father may, by *contract*, surrender to another his parental rights over his infant child.

In an English case in point, the father of an infant daughter, the mother having died recently, had agreed to let it live with an uncle, who was to maintain and educate it until it should be able to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support; the agreement was acted upon for some months; but it was held that, notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle; and in a proceeding by *habeas corpus*, the child was delivered to the father: *R. v. Smith*, 16 Eng. Law and Eq. 221. But in a case in Massachusetts, where a child had been given up at its birth, the mother having then died, to its grandparents, who kept it for thirteen years at their own expense, without any demand made by the father for its restoration, the court (Shaw, Ch. J.,) refused to restore the child to its father. In *Mayne v. Baldwin*, 1 Halst. Ch. 454, an infant daughter was restored to her father on *habeas corpus*, although he had committed her to the respondent, and agreed that the respondent should be *her father* until she should attain the age of twenty-one years. The same view was taken by the supreme court of New Hampshire in *State v. Libbey*, 44 N. H., 321, where the precise question is considered, upon a state of facts which appear from the imperfect statement in the opinion, to be very similar to the case in Canada. The Court say: "In this case the child, when about two years and five months old, was placed with respondent in February, 1859, and maintained by him until December, 1861, when this application was made; and it appeared that until December, 1861, a period of nearly three years, the father gave no notice of his wish to have the child restored to him. Upon the subject of the terms upon which the child was

taken by the respondent, the evidence is conflicting; but upon a careful consideration of it, we think that the relation is not impeached, but that the father placed the child in the custody of the respondent, with an agreement that it should be his, and be brought up by him. And the question now is, whether in the exercise of a sound discretion, the custody of the child ought to be withheld. The child had been suffered to remain with the respondent nearly four years before the application, and she is now about six and a half years old; and assuming that there is nothing in the character of the father or stepmother that renders them unsuitable to be entrusted with the nurture of the child, we can see nothing in the other circumstances that would make the change of custody sought for, hazardous to the permanent interests and welfare of the child; certainly not to such an extent as to justify a final severing of the ties which bind the parent and child together. \* \* \* Our opinion, therefore, is that, upon refunding the sums of money expended by the respondent, under the agreement, the father may revoke his consent, and thereupon, the custody of the child may be awarded to him." But it has been held, that where a father, whose wife had died, gave his female child, three years old, to her aunt, with whom she remained six years, the father during that time visiting her but once a year, and contributing nothing to her support, his right to her custody was gone: *Com. v. Dougherty*, 1 Pa. Legal Gazette 63.

The principle declared in the case in Canada has been carried even further. It has been held that a husband cannot, by agreement with his wife, delegate to her the care and custody of their infant children: *People v. Mercein*, 3 Hill, (N. Y.) 399, 408; *Johnson v. Terry*, 30 Conn. 259, 263; *Earl of Westmeath's case*, Jacob, 251, note (c). Although such agreement be by deed. *Jac.* 251.

And, excepting of course, those cases where the father, by reason of immoral habits, extreme poverty, or otherwise, is unfit to have the custody of his infant child; and excepting also, contests between husband and wife for the custody of their minor children, as well as cases governed by the laws relating to the apprenticeship of minors, the rule undoubtedly is as stated by Mr. Justice

## PARENT AND CHILD—THE CHANCERY IN OLDEN TIMES IN ENGLAND.

Cowen, in *People v. Mercein*, *supra*, that a father holds his children under a personal trust which he cannot alienate. And the supreme court of Illinois has recently held that the right of a father to the care, custody and nurture of his child cannot be *infringed by the State*, except for gross unfitness for the charge, or for the commission of crime by the child, exposing him to imprisonment; and hence, that a statute authorizing children to be committed to a reform school, without any charge of, or trial for crime, but merely because they appear to officers of the law to be destitute of proper parental care, and growing up in idleness, vice, etc., is unconstitutional, as involving imprisonment without due process of law; and that a child thus committed may be discharged on *habeas corpus*, on the father's petition: *People v. Turner*, 55 Ill. 280.—*Central Law Journal*.

### THE CHANCERY IN OLDEN TIMES IN ENGLAND.

Under Edward I, the officers of the Chancery (Court) lived and lodged together at an inn, or hospitium, which, when the King resided at Westminster, was near the palace, or, perhaps, part of it, until it was removed to the Domus Conversorum, under Edward III. The writs were sealed on a marble table, which stood at the upper end of the hall, and there they seemed to have been delivered out to the suitors. It is supposed that this table still exists beneath the stone stairs. When the King traveled he was followed by the whole establishment of the Chancery (Chancellor, clerks, and all), on which occasion it was usual to require a strong horse, able to carry the rolls, from some religious house bound to furnish the animal; and at the towns where the King rested during his progress, a hospitium was assigned to the Chancery.

Even as far back as the reign of James I the Chancellor's duties were very weighty; when Lord-Keeper Williams first held the Great Seal, the press of business was so great that he was compelled to sit in his court for two hours before daylight, and to remain there until between eight and nine, and then repair to the House of Lords, where he stayed till twelve or one; after taking some re-

freshment at home, he would return to his court, and hear such causes as he was able to hear in the morning; or, if he attended at council, he would resume his seat in Chancery towards evening, and sit there until eight o'clock, and even later; on reaching home after all this fatigue, he read all the papers his secretaries laid before him; and then, although the night was far gone, would prepare himself for the House of Lords the next day. Whitelock mentions himself and his brother commissioners sitting in Chancery from five o'clock in the morning to five o'clock in the afternoon.

Sir Lancelot Shadwell, the late Vice-Chancellor of England, in his evidence before the Chancellor Commission, declared the business in the Court was then so heavy, "that *three angels* could not get through it." Sir Thomas More, when he took his seat for the first time in the Court of Chancery, addressing the bar and audience said, "I ascend this seat as a place full of labour and danger, voyd of all solide and true honour; the which by how much higher it is, by so much greater fall I am to feare." Laborious indeed it was then, and still more laborious is it now—but void of honour it never was, and never will be; and all such professions of indifference to its dignity, because of the duties annexed to that dignity, as much deserve contempt as they meet with neglect. "When I was Chancellor," says Bacon, "I told Gondomar, the Spanish Ambassador, that I would willingly forbear the honour to get rid of the burden; that I had always a desire to lead a private life." Gondomar answered that he would tell me a tale:—"My lord, once there was an old rat that would needs leave the world; he acquainted the young rats that he would retire into his hole, and spend his days in solitude, and commanded them to respect his philosophical seclusion. They forbore two or three days; at last, one harder than his fellows, ventured in to see how he did; he entered and found him sitting in the midst of a rich parmesan cheese."—*Am. Land and Law Adviser*.

## CANADA REPORTS.

## ONTARIO.

## NOTES OF RECENT DECISIONS.

## QUEEN'S BENCH.

MICHAELMAS TERM, 1873.

DULLEA V. TAYLOR.

*Contract—Notice of intention not to perform—Right to sue.*

Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue.

Declaration : that the plaintiff agreed to sell and defendants to buy certain land in Oshawa adjoining the lands of plaintiff, which would be thereby enhanced in value to plaintiff, for \$325, upon the following terms : the money to be paid and the conveyance executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware ; and that in case he should not do this, he could at the expiration of said eighteen months reconvey the land and receive back the purchase money ; and all things happened and all times elapsed, &c., and plaintiff was ready to convey, and yet defendant did not pay plaintiff nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c.

Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware, on the said lot, and defendant with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon ; that the plaintiff knew this when he made the agreement ; and before any demand by plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to plaintiff, and that they would not require said land, and that the plaintiff was released, and defendant did not otherwise abandon said agreement.

*Held*, following *Holchester v. De Latour*, 2 E. & B. 678, that the declaration was good, and the plea no answer to it.

BIARD V. STEELE.

*Foreign Commission—Proof of due taking.*

*Held*, since 34 Vict. ch. 14 O., no objection to a foreign commission that the affidavit, that it was duly taken, was made before a Notary Public, and not before the Mayor or Chief Officer, as required by C. S., U. C. ch. 32 sec. 31.

THE JOSEPH HALL MANUFACTURING COMPANY V. HARNDEN ET AL.

*Promissory note—Stamps—Affixing double duty—Payee a "subsequent party."*

*Held*, following *Worley et al. v. Hunton et al.* 33 U. C. Q. B. 152, and dissenting from *Escott v. Escott*, 29 C. P. 305, that a payee is a "subsequent party" to a promissory note within the meaning of 31 Vict. ch. 9, sec. 12, who may pay the double duty provided by that section.

The plea was, that at the time of writing the note, no adhesive stamp or stamps whatever were affixed to the note ; to which the plaintiff replied that they paid double duty "by affixing to the note stamps to the amount of double duty payable in respect thereof."

*Quere* whether the plea should not also have denied that the note was written on stamped paper ; and *semble*, that the replication should have stated the amount in stamps affixed.

GILCHRIST V. GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

*Fire Insurance—Further Insurance by stranger—C. S. U. C. ch. 52, sec. 28.*

Sec. 28 of the Mutual Insurance Act, C. S. U. C. ch. 52, makes a policy voidable "if insurance on any house or building subsists in the Company and in any other office or by any other person at the same time," without the consent of the Company.

*Held*, that the further insurance must be by the same person who has before insured, or in the same interest.

IN RE THE SHERIFF OF THE COUNTY OF LINCOLN AND THE TREASURER AND THE CORPORATION OF THE COUNTY OF LINCOLN.

*Sheriff's account—County audit—Allowance by Government.*

A sheriff's account against a county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account has been allowed and paid by the Government to the county.



C. L. Cham.]

NOTES OF RECENT DECISIONS—RE REARDON.

[Ir. Rep.]

## COMMON LAW CHAMBERS.

CANADA PERMANENT BUILDING AND SAVINGS  
SOCIETY V. FOREST.*Administration of justice act 1873, sec. 24, applicable  
to interpleader.*

[January 14, 1874—MR. DALTON.]

The plaintiffs applied for an order to examine the defendant. It was urged that the same reasons for, and advantages arising from the examination of adverse parties, exist in the case of an interpleader issue as in any action-at-law.

*Held*, that the words "action-at-law," of the 24th sec., include an interpleader proceeding.

## IRISH REPORTS.

## COURT OF QUEEN'S BENCH.

## RE REARDON.

*Bringing up prisoners before Coroners—Jurisdiction of  
Police Magistrates—Habeas Corpus—44 Geo. 3, c.  
102—Court of Record—Evidence of suspected person  
at inquest.*

Where a prisoner committed to custody under a magistrate's remand, on a charge of homicide, desires to be present, in order that he may hear the evidence and be tendered as a witness before the coroner sitting upon the body of the deceased, and it appears that the coroner does not object to the prisoner's presence, and that it would not tend to frustrate the ends of justice, the Court will, in the exercise of its discretion, grant a writ of *Habeas corpus* to have the prisoner in attendance at the inquest, and so that he may be examined as a witness upon the taking of the inquisition.

The Police Magistrates, in like case, have not jurisdiction to direct or authorize the production of the prisoner at the coroner's inquest.

[Irish Law Times, Nov. 8, 1873.]

Motion, on notice,\* on behalf of Patrick Reardon, a prisoner confined in Richmond Bridewell, for a writ of *habeas corpus*, in order that he should be in attendance at an inquest before the coroner, and so that he might there be examined as a witness touching the subject matter of the inquisition.

The motion was grounded on an affidavit of the applicant's attorney, who deposed that the said Patrick Reardon was then confined in the Richmond Prison, on a charge of having caused the death of a woman named Kate Pyne, by throwing her into the river at Aston's Quay, Dublin, whereby she was drowned; that, on September 24th, 1873, said Patrick Reardon was brought before E. S. Dix, Esq., one of the

divisional justices, at the Southern Police Court, charged with the commission of said offence, and that, some evidence having been given, the deponent applied to that magistrate that, inasmuch as the coroner for the city of Dublin was about to hold an inquest into the cause of the death of said Kate Pyne, and of the circumstances attending same, the said Patrick Reardon should be remanded generally, in order that, when the time at which the coroner should hold his inquest should be ascertained, the said Patrick Reardon might be again brought before the magistrate, and be by him transmitted, in the usual manner, in the custody of the police to the coroner; that the magistrate refused the application, and, on the conclusion of the evidence, remanded the said Patrick Reardon for the period of seven days; that, on the following day (Sept. 25th), Dr. N. C. White, one of the coroners for the borough of Dublin, held a court, having empanelled a jury of twelve, at the Morgue in Malborough-street, the place where the body of the said Kate Pyne was, for the purpose of inquiring when, how, and by what means the said Kate Pyne came by her death; that the deponent, at said court, informed the coroner that the said Patrick Reardon was suspected of having caused the death of said Kate Pyne, and made a request that Patrick Reardon should be present in that court upon the hearing, and objected to the reception of any evidence given against him in his absence; that the police authorities informed the coroner that the said Patrick Reardon was then in the custody of the Governor of Richmond Prison, on remand by E. S. Dix, Esq., charged as aforesaid; that the court was then adjourned by the coroner till October 6th, 1873, for the purpose of having the said Patrick Reardon present when the evidence against him should be heard; that the deponent, accordingly, applied by letter to the Crown, requesting that the said Patrick Reardon should be produced at the adjourned sitting of the said coroner's court, and in reply received a letter, declining to apply for a writ of *habeas corpus* for that purpose; that, on October 1st, the said Patrick Reardon was again brought before E. S. Dix, Esq., in said police court, and further evidence was heard against him; that the deponent then again (having detailed the transactions in the coroner's court) applied to the magistrate that the said Patrick Reardon be transmitted to the coroner, according to the practice theretofore adopted towards persons similarly suspected, but that, at the instance of the Crown, the magistrates refused the application, and further remanded the said

\* It was so directed by Fitzgerald, J., in this case. See as to the practice, *Re Mathews*, 12 Ir. C. L. R. 241, 6 Ir. Jur. N. S. 225.—*Rep.*

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Patrick Reardon to Richmond Prison for a period of seven days, where he remained still in custody of the Governor of said prison.

*Byrne*, in support of the motion.—According to the practice heretofore prevailing in this country, persons in custody charged with homicide have always been produced at coroner's inquests, under the orders or warrants of the magistrates, granted for that purpose. In this instance, after the discovery of the dead body, the coroner proceeded to hold an inquest, but, in consequence of instructions recently given to the police by the Crown authorities,\* the police did not produce the prisoner at the inquest. He was brought before a police-magistrate, who remanded him for a week. The magistrate, on the opposition of the Crown, refused the application that the prisoner should be transmitted, in the usual course, to the coroner's court; and the Crown authorities, on being asked, refused to apply for a *habeas corpus* to have the prisoner so transmitted. The coroner adjourned the inquest, so that a *habeas corpus* might be applied for. The prisoner himself desires to be present; otherwise, in his absence a verdict of wilful murder may be returned against him. He wishes to hear the evidence affecting him, and it is necessary that he should be present, in order that he himself may be tendered as a witness, or that, even if not sworn, he may make a statement, according to circumstances; † *Hayes*, C.L., 199. For this purpose, the court is asked, in its discretion, to issue the writ in aid of the coroner's court.

*W. Johnson*, Q.C., on behalf of the Crown, *contra*.—We admit that the court has power to issue the writ, in its discretion; but, special circumstances should be shown in order to justify the granting of the writ. Had such special circumstances existed, the Crown would have applied for the issuing of the writ, and so saved the prisoner the expense of doing so; but, no such circumstances have been shown that would have warranted the application. A question of grave importance in the administration of the criminal law then arises, namely, whether, without special circumstances, and as a mere matter of course, a writ of *habeas corpus* is to issue, if a coroner wish to have a prisoner produced before him who is in custody on remand. No precedent is to be found in which a prisoner has been produced before the coroner, on a writ of *habeas corpus*. This was admitted in *Re Cooke* 7 Q.B. 653.† It is not enough that, as stated, an application was made to the magistrate and

refused, to transmit the prisoner. The practice under which the metropolitan magistrates have, heretofore, transmitted prisoners to the coroner's court,\* for some indefinite purpose, and for an indefinite period, was not warranted by any principle of law; and the law officers of the Crown, having been consulted, gave their opinion that the practice was unwarranted in law, that the person so transmitted would be in illegal custody, and that the persons who had the prisoner in charge during such transmission would be liable to an action for false imprisonment, and, if in attempting to escape he were resisted with violence, serious consequences might be entailed on those who inflicted the injuries.† The duty of a police constable is, the moment he arrests a person on a criminal charge, to take him with all reasonable expedition before a magistrate; and the constable has no power whatever to take the prisoner before a coroner, or to take him from the magistrate to the coroner. The duty of the magistrate is to discharge the prisoner forthwith, if no facts are shown to warrant the prisoner's detention; but, if a *prima facie* case be made against the accused, then the magistrate should either commit him for trial, or, if the case were incomplete, commit him on remand for further inquiry, in order that it may be ultimately decided whether the prisoner should be discharged or committed for trial. Here the magistrate, having been apprised of the opinion of the law officers, concurred in it, and, accordingly, declined to accede to the application to send the prisoner in illegal custody to the coroner. The jurisdiction exercised in the magistrate's court is wholly different from that of the coroner. The magistrate deals with a criminal charge, and either decides summarily upon it, if he has jurisdiction, or, if he has not, puts it in train for further inquiry; while, the office of the coroner is not to arraign or charge a prisoner, but simply to ascertain how and in what manner the deceased person came by his or her death; the person suspected should not be considered in the coroner's court as an accused person, nor is he such until after the verdict is found; and no man's evidence could be excluded at the inquest on the ground that he might criminate himself: *Wakely v. Cooke*, 4 Exch. 511; *Jervis on Coroners*, 253. There is

\* See 7 Ir. L. T. 483, 533.—*Rep.*

† In *re Galtway*, 19 L. T. N. S. 262, where an application was made, under 43 Geo. 3, c. 140, s. 1, for a *habeas corpus* for the purpose of bringing a military officer, in prison for debt, before a medical board for examination as to health, Cockburn, C. J., said, "The Court is asked to compel the sheriff to take the additional risk of conveying the prisoner to and from prison, when, if the Court has no authority to direct the writ to issue, he would be liable for an escape. The Court has no authority under this section."—*Rep.*

\* See 7 Ir. L. T. 505; Com. Ob. 483, 533.—*Rep.*

† See 3 C. 14 L., J. M. C. 188, 9 Jur. 869.—*Rep.*

[Ir. Rep.]

RE REARDON.

[Ir. Rep.]

nothing in the nature itself of a coroner's inquiry necessitating the presence of the suspected person. Evidence can be taken in his absence. If it were necessary to identify him, the witnesses who have identified him before the magistrate can attend, and repeat their evidence before the coroner, so that a writ of *habeas corpus*, being unnecessary for that purpose, would not be granted to bring the prisoner before the coroner: *Re Cooke*, 7 Q.B. 653. There the application was refused, although there was an affidavit to the effect that the coroner and jury could not proceed with the inquiry unless the prisoner was produced; and it was held, that the fact of the coroner desiring to have the prisoner produced before him would not constitute a special circumstance, in order to justify the granting of a writ for his production: *id.* There is no evidence to show that the presence of the accused before the coroner is a special necessity. According to the statements of the affidavit, it is sought to have the prisoner produced, not to give evidence, but, to hear the evidence given; and the Court is asked to decide, in effect, that it is a matter of course that the writ should issue in every ordinary and unexceptional case, in order to enable the prisoner to be brought before the coroner, and to hear the evidence given at the inquest.

*Byrne*, in reply.—*Re Cooke* is distinguishable, as there the application was made, not as now on behalf of the prisoner, but, by the coroner. The claim of a suspected person to be present at an inquiry, upon which a verdict may be returned against him, rests upon a surer basis than upon the mere wish of the coroner that he should be present. It may be necessary or judicious for the prisoner's advisers to tender him as a witness. The coroner's jury are sworn to try "when, how, and by what means" the deceased came by his or her death\*; and the verdict or finding of a coroner's jury is equivalent to an indictment.† Admitting that the police magistrate had no power to transmit the prisoner from his custody to that of the coroner, the practice was, at all events, sanctioned by convenience, and the object which it was intended to promote is approved by the ordinary principles of natural justice.‡ The abrupt departure from that practice, the setting up of the magistrate's court above that of the coroner, to

which it is inferior in law, and the exposure of prisoners to the expense, delay, and needless affliction of a double procedure, places suspected persons in a position in which the law, presuming, as it does, that they are innocent, should assist them if possible. The prisoner is amenable to the jurisdiction of two courts sitting simultaneously, a preliminary investigation proceeding at the same time in each, and each enabled to send him forward for trial on the same charge. Upon this charge, at the investigation in the police court, evidence could not be received against the prisoner in his absence. The coroner has full power, either before or after the inquest, to order the arrest of a suspected person, he has the same power of committing the prisoner for trial that the magistrate has, but the coroner's court is the superior court, and the coroner's inquisition is the more important in its consequences as affecting the prisoner; and yet, is it to be said that the prisoner should not be permitted to be present at the inquest, and that any circumstance is necessary in order to sustain an application for the purpose, other than the fact that he himself desires to be present at an inquiry which may possibly result in a verdict of wilful murder against him, and that his advisers desire to have the opportunity of tendering his evidence in aid of the inquiry, and so that the ends of justice may be accomplished? The same reason that should actuate the Crown and the police to bring forward evidence in the coroner's court, should operate to prevent the coroner's inquiry from being frustrated by keeping back the person against whom the admitted jurisdiction of the coroner attaches. If no opportunity be given of examining the prisoner, or tendering him as a witness at the inquest, and if no opportunity for cross-examination be afforded to him, the coroner's inquiry will be impeded, and the result of that inquiry rendered the more liable to error. And, if a verdict of wilful murder be found against the suspected person behind his back, that verdict operating as an indictment, the jurisdiction of the magistrate would be thereby ousted, and the prisoner could not again be brought before the magistrate on remand for the same offence.\*

FITZGERALD, J.—It seems to me that the law officers of the Crown were correct in advising that, once an accused person has been committed to custody upon a remand on a criminal charge, the magistrates have no jurisdiction to order that the prisoner should be produced before the coroner, and that neither has the gaoler any authority, without a writ of *habeas corpus*, to pro

\* See generally, 4 Inst. 271, 2 *id.* 31; Brit. cap. 1, ss. 5, 13; *R. v. Herford*, 3 E. & E. 135, 29 L. J. Q. B. 249; 23 Vict. 2; 35 & 36 Vict. 76; 35 & 36 Vict. 77.—*Rar.*

† See *R. v. Ingham*, 5 B. & S. 257, 23 L. J. Q. B. 184.—*Rar.*

‡ See *Maubourquet v. Wyse*, Ir. R., 1 C. L. 471; *R. v. Brook*, 16 C.B.N.S. 403; *Ex parte Kinning*, 4 C. B. 507.—*Rar.*

\* See *quære! Cf. R. v. Spoor*, 11 C. C. C. 550.—*Rar.*

[Ir. Rep.]

RE REARDON.

[Ir. Rep.]

duce the prisoner at the inquest. The practice which hitherto prevailed was very convenient, but I am not aware that there was any legal warrant for it. I am of opinion that it is, upon all grounds, desirable that the prisoner should be brought before the coroner, and that I am bound to assist an application for that purpose if, in point of law, it be competent to me to do so. True it is, that there is no accusation formally before the coroner; but I cannot disregard the fact that, although the coroner's court is one for preliminary investigation only, the real inquiry before the coroner in the present instance is whether Patrick Reardon caused, or in any manner caused, the death of Kate Pyne, or assisted in her suicide. In substance, therefore, the inquiry before the coroner is the same as that before the magistrate. The difficulty in this case arises from the circumstance that the suspected person has been brought before and committed by the magistrate, instead of being detained and brought before the coroner, whose court ought, in the first instance,\* to have charge of the preliminary inquiry. The real inquiry before the coroner being, practically, whether the prisoner is in any way chargeable with the death in question, it is on all grounds expedient, in order that the ends of justice may be accomplished, that he should be present at the investigation, if he so desires and the coroner does not object. It would be a strange anomaly, if, in the coroner's court, the person suspected in relation to the matter of the inquiry, and desirous of being present on the hearing, should be by law excluded. The magistrate's court—the inferior court—can only inquire and commit for trial, and yet, in the magistrate's court, the presence of the accused is essential. When the accused is amenable, he must have an opportunity of examining and cross-examining witnesses, and of hearing the depositions, which must be taken in his presence; and then, and then only, the magistrate may send the case for trial, that is, to be investigated by the grand jury and tried by a common jury. But in the coroner's court, though there is no technical or formal accusation, he might, on evidence given in his absence, although he had wished to be present, have a verdict of wilful murder returned against him—a verdict carrying with it certain consequences

affecting him, and on which he may be put upon his trial. It is not at all of necessity that he should be present at the inquest. And it would be a grave mistake to suppose that, in his absence, evidence could not be gone into, or that, if affecting him, such evidence ought not to be received, for the evidence is not given technically upon a charge against any person, but merely for information in relation to the inquiry. Yet, while it is not necessary, I repeat that the suspected person ought to be present at the coroner's inquiry, unless his presence might tend to frustrate the ends of justice. It is admitted by the counsel for the applicant, that in such case a *habeas corpus ad subjiendum* does not lie; and with this I concur, as that writ lies only to relieve from custody alleged to be illegal, whereas here the custody under the magistrate's remand is clearly legal. On the other hand, it is admitted by counsel for the Crown that, under special circumstances, the court may issue this writ in aid of the defective powers of an inferior court. Upon that question I do not, at present, express any judgment. There is no authority on it, although the precedents seem to warrant it, as also the *ex parte* case of *R. v. Hussey*, 11 Ir. C. L. R., Ap. 20.\* If it were necessary to form a judgment upon it, I think that in this case special circumstances do exist. I would be disposed to hold that special circumstances exist where a prisoner himself says, "I desire to be present at the inquiry, and to hear the evidence affecting me; a question suggested by me upon cross-examination may dispel the suspicion which at present surrounds me; I wish to hear the case made against me, and upon which a verdict against me may depend." The coroner does not object; he, on the contrary, seems to approve of this proceeding, as he has adjourned his court to give opportunity to this application.† It may be that the coroner will not receive his evidence; but that is a question for the coroner to consider, and not for me to decide. In addition, the prisoner's counsel says, "I wish to have him present in order that he may hear the evidence, and that I may, at the proper time, tender him as a witness." I have the power, under the statute, to grant a *habeas corpus ad*

\* Cf. *re Galswey*, 19 L. T. N. S. 262.—R.R.

\* In England, for a special reason, where the coroner commits a person for trial, an investigation should still take place before magistrates also, in order that the witnesses may be bound over and their expenses allowed, under 30 & 31 Vict., §§ 3, 5, "so that the prisoner might not be deprived of any assistance which the law gives him" (*per Blackburn, J., R. v. Spoor*, 11 C. C. C. 350.)—R.R.

† That it is discretionary with the coroner to hold the inquest in private, see *Garnett v. Ferrand*, 6 B. & Cr. 626, 9 D. & R. 657, where Lord Tenterden observes, "It may be requisite that a suspected person should not, in so early a stage, be informed of the suspicion against him, and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise." As to the publication of *ex parte* proceedings before the coroner, see *R. v. Fleet*, 1 B. & Aldr. 284.—R.R.

[Ir. Rep.]

RE REARDON—REVIEWS.

[Ir. Rep.]

*testificandum*. The language of the statute which authorizes me to grant a *habeas corpus ad testificandum*, in order to assist in any inquiry in any court of record, is quite large enough to enable me in this case to issue the writ, as the coroner's court is a court of record.\* The affidavit, however, at present before the court, is defective in not stating that the prisoner is advised and believes that it is necessary to tender himself as a witness at the inquest. If this defect be supplied by another sufficient affidavit, I shall issue a *habeas corpus*, under which the prisoner will be legally brought forward at the inquest before the coroner.

A supplementary affidavit was, accordingly, made by the applicant's attorney, stating that he was advised and believed that the presence of the said Patrick Reardon would be necessary at the coroner's inquest on the body of said Kate Pyne, to be held on October 6, inasmuch as it was intended to tender the said Patrick Reardon as a witness, and to examine him in relation to said inquest.

And, thereupon, a writ of *habeas corpus* was issued, directed to the sheriff of the city of Dublin, and to the Governor of Richmond Bridewell, commanding as follows:—"That you have before N. C. White, gentleman, one of the coroners, on Monday, the 6th day of October instant, at the place known as and called the Morgue, in, &c., the body of Patrick Reardon, being committed and detained in, &c., together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, in order and so that he may be then and there in attendance before the said coroner, at, upon, and during the taking of a certain inquest and inquisition holden by the said coroner at the time and place aforesaid, touching the death of one Kate Pyne, and in order and so that he may be then and there examined as a witness, at and upon the taking of the inquest and inquisition aforesaid, and so from day to day, until the taking of the said inquest and inquisition shall have concluded. And, when the taking of the said inquest and inquisition shall have concluded, then that you take him back without delay to said gaol, under

your custody, and cause him to be detained therein, under safe custody, until he shall be from thence discharged by due course of law."

## REVIEWS.

A TREATISE ON THE LAW RELATING TO THE EXECUTION AND REVOCATION OF WILLS AND TO TESTAMENTARY CAPACITY. By Richard Thomas Walkem, of Osgoode Hall, Barrister-at-Law. Toronto: Willing and Williamson, 1873:

The Wills Act of 1873 was not passed before the necessity for some legislation on the subject was felt. The law had been for many years in an unsatisfactory position, not only in many particulars affecting the execution and revocation of wills and testamentary capacity, but from the fact that much of the law on the subject, being contained in Imperial Acts, was inaccessible to laymen generally, as well as to many of the profession in the rural districts. A somewhat similar measure, based upon the English Act, was, we believe, prepared by the late Chancellor Vankoughnet when in Parliament, and was understood to have been revised at his instance by Sir James Macaulay and Judge Gowan, but for some reason it never came to anything. There seemed to have been some feeling at that time that it might be dangerous in a country like this to impose rigid rules with regard to the execution of wills, which were commonly drawn not by lawyers, but by laymen throughout the country. Whatever weight there may have been in this objection, it can scarcely be doubted that the time has come for putting the law upon a proper footing and assimilating it in many respects to the Imperial Acts. One great advantage is, that we shall now get the benefit of the light which has been thrown upon similar provisions in England by numerous decided cases.

The public is indebted to Mr. Meredith for the introduction of the Act which came into force here on the 1st January last. His object was in the first place to do away with the unsatisfactory state of things already alluded to; and, in the next place, to introduce into our law those amendments made by the Imperial Act, 1 Vict. cap. 26, which had not already been intro-

\* See 1 & 2 Ph. & M. c. 13, s. 5; 2 Hawk., P. C., coroner b., 2 c. 9, s. 31; 2 Hale P. C. 65; *Garnett v. Ferrand*, 6 B. & C. 611, 9 D. & R. 657. So, in *Thomas v. Chilton*, 31 L. J. Q. B. 140, 2 B. & S. 478, Crompton, J., observes, "My Lord is coroner of England, and I think that every coroner is a judge of a court of record; it shows what a high office he holds, and what high functions he has." And further, as to the dignity of coroner see 2 Inst. 31, 173; and that the Chief Justice of the Court of Queen's Bench is Supreme Coroner, see *R. v. J. of Gloucestershire*, 7 E. & B. 205, 29 L. T. 180. As to where a *habeas corpus ad test. inq.* under 44 Geo. III. c. 102, see also, *Re Gabeay*, 19 L. T. N. S. 262.—*REV.*

## REVIEWS.

duced, amongst which may be mentioned: The power to dispose of rights of entry and contingent interests; lapsed devise to fall into the residue; words importing either a failure of issue of a person in his lifetime or at his death, or an indefinite failure of issue, to mean a failure of issue in the lifetime or at the death, and not an indefinite failure of issue; devise of an estate tail not to lapse if any issue of the devisee living at the death of the testator; gifts to issue not to lapse if any issue by the devisee or legatee living at the death of the testator; wills of personalty to be executed with the same formalities as wills of real estate.

Various sections of the Imperial Act referred to had been re-enacted in this Province at different times, but many important provisions had not been.

The Acts consolidated in the measure which recently became law are: (1) The Imperial Act already referred to; (2) the provisions of the Act of 1865, relating to property and trusts, which refer to devisees in trust raising money by sale notwithstanding want of express power in the will (sections 13, 14, 15, 16, and 17, of the Act of 1865), and the provisions relating to mortgage debts being primarily chargeable on lands (section 33 of Act of 1865), with the amendments to that section contained in 35 Vict. cap. 15, and (3) the Act 33 Vict. cap. 18 (Ontario) as to powers of executors and administrators. The new provisions would appear to be (1) the repeal of section 16 of the Married Women's Act (Con. Stat. U.C. cap. 73) and giving to married women the same right to dispose, by will, of their property as unmarried women have; (2) an extension of the provisions of 33 Vict. cap. 18 (Ont.) so as to enable executors to exercise power of sale contained in a will where no person is by the will appointed to exercise the power.

The mode of executing and attesting a will is that prescribed by the Imperial Act, 1 Vict. cap. 26, instead of the two methods which were formerly open, viz., under the provisions of the Statute of Frauds, or under section 13 of Con. Stat. U.C., cap. 82.

There appeared in this journal last year some articles on the Wills Act of 1873. They will lose none of their value by being known to have been

from the pen of Mr. Walkem, the author of the book now before us. Knowing the careful study that he had given to the subject, we felt that we should merit the thanks of our readers by giving them the benefit of his research. A comprehensive sketch was there given of the main features of the Act, the reason for the changes, and the result effected. Mr. Walkem, in the volume just published, dips yet deeper into the subject treated of, and our expectations founded on the articles alluded to have been more than realised in the masterly and thorough manner in which the author has handled that part of the law of which he treats.

It is scarcely necessary to speak more at length of a book which will, ere this reaches our readers, be found in most of their libraries. Should there be any who have not yet provided themselves with it, we would advise them at once to do so.

Some seven hundred decided cases are referred to throughout the work, and their bearing carefully and intelligently considered, not strung together "as the manner of some is," evincing a thorough knowledge of his subject, and a capacity to convey that knowledge to others. The appendix contains the text of the Act and a number of concise and useful forms of Wills. The index is full and complete, and the general typographical appearance of the book reflects much credit upon the enterprising publishers.

It is desirable that treatises having especial reference to the law as administered in Canada should, so far as and whenever they are worthy of the distinction, be used in the course of instruction in the Law School, or as a test of knowledge in the examinations for call or admission. We shall be surprised if this book is not in due course placed upon the list

THE CENTRAL LAW JOURNAL, (weekly).  
St. Louis, Mo.: Soule, Thomas &  
Wentworth, Publishers.

We have to welcome a valuable addition to legal periodicals in this new journal, which had its first issue on the first day of this year. The name of the editor is a guarantee for the excellence of the paper,—that editor being Judge Dillon, who has already acquired reputation as a

## REVIEWS—CORRESPONDENCE.

legal author, by his treatise upon Municipal Corporations. It is, by the way, a noticeable feature of the industry of the United States Bench, that so many of the judges occupy themselves and benefit the profession by engaging in legal authorship. Among other judges of eminence, there is Judge Cooley, who, besides having on hand a treatise upon Fraud, is the supervising editor of articles pertaining to jurisprudence in a new edition of Appleton's American Cyclopedia. By way of contrast, we observe that Chief Justice Cockburn is relieving the tedium of the Tichborne trial by preparing a series of papers upon that interminable literary puzzle, Junius. One of the distinguishing features of Judge Dillon's journal is the very able summary of the law appended to most of the cases reported therein, by way of notes—as for example in the spring-gun case, which we intend to republish; also a department entitled, "Notes and Queries," for the disentanglement of knotty points of law. We extract from some of the numbers articles relating to Canadian case-law, as expounded in Quebec, which will be found elsewhere. We wish our new contemporary a long and successful career.

**THE WASHINGTON LAW REPORTER**, (weekly). Washington, D.C.: Powell & Suick, Publishers.

This publication is intended mainly to supply decisions hitherto unreported of cases determined in the Supreme Court of the District of Columbia, and so to afford to the Washington bar the means of ready reference to local precedent. It contains besides legal information and discussions of general interest, and herein affords another example of the wonderful development of legal journalism in the United States. To this source the *Law Magazine and Review* traces the excellence of American lawyers as jurists; and in this aspect periodicals such as the present, published at the Federal capital, wield great influence and accomplish great good.

**THE SOUTHERN LAW REVIEW**. January, 1874. Nashville: Frank T. Reid, & Co., Publishers.

This quarterly is always welcome to us, the more so that it mingles law and litera-

ture in its columns. The present number contains very pleasant reading in the reminiscences of English Judges in 1807, consisting of extracts from the diary of Chief Justice Taylor of North Carolina, during a visit to England in that year, and the racy article of Mr. Hill on "How the law has fared in literature." The more severe articles, particularly that on the rule in Shelley's case, are well written and maintain the high legal character of this excellent Review.

**BLACKWOOD AND THE BRITISH QUARTERLIES**. Leonard Scott Publishing Co., 140 Fulton Street, New York, U. S.

The first number of Blackwood for the year 1874 comes in larger type and on a larger page, a great improvement, and more like the original Ebony.

"The Parisians," by Bulwer, is finished—a remarkable book, which will perhaps be more appreciated ten years hence than now. "The story of Valentine and his Brother" promises well.

We also find the second number of "International Vanities," treating of "Forms." It tells of the wording of diplomatic and other documents and the languages in which they are written, and is interspersed with quotations showing the style of royal letters, treaties, etc.

The other articles are "John Stuart Mill, an autobiography," "The Indian Mutiny: Sir Hope Grant"—and the usual political article, etc. The number is an exceedingly good one in every way.

## CORRESPONDENCE.

*Meaning of "Cause of Action."*

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—You have recently been discussing the meaning of the phrase "cause of action," in the 44th section of the Common Law Procedure Act, and several recent cases upon its construction. You say that our Court of Queen's Bench in *McGiverin v. James*, 33 U. C. Q. B. 203, follows the decision of the Queen's Bench in England in *Cherry v. Thompson*, L. R. 7 Q. B. 573, and think that the whole cause of action must arise

## CORRESPONDENCE.

within the jurisdiction, and not merely the act or omission which completes the cause of action.

As I understand *McGiverin v. James*, the case does not decide that the *cause of action* means the *whole* cause of action, as surely the *whole* cause of action means both contract and breach: while in this case the contract was made at Hamilton, and the breach occurred at Liverpool. Now, to my mind, the whole cause of action in this case arose neither at Hamilton or Liverpool. It could not have arisen at Hamilton, for the breach did not occur there; and it did not arise at Liverpool, for the contract was not made there. It seems to me that the case does not decide that the *whole* cause of action must arise within the jurisdiction.

Let me say a few words upon what I think the *cause of action* means. When two parties enter into a contract, it is presumed that they mean to perform it—it is not presumed that a cause of action will arise at all. In fact the mere making of a contract, to be performed at a future day, does not create a cause of action at all, and it is in cases of executory contracts that the question most frequently arises. It is only when the contract is broken that a cause of action arises, and not before, and it seems to me that if the breach of a contract took place in Ontario, though made elsewhere, our Courts would have jurisdiction.

You seem to think that the cases of *McGiverin v. James*, and *Cherry v. Thompson*, are inconsistent with or over-rule *Jackson v. Spittal*, and *Denham v. Spence*. But it seems to me that the cases can stand together by considering that the cases of *Jackson v. Spittal* and *Denham v. Spence* refer to the first part of sec. 44, "the cause of action," and *McGiverin v. James* to the next clause, "in respect of the breach of a contract made in Ontario." Then it will be held that the action may be brought in Ontario, if either the contract be made here, as in *McGiverin v. James*, or if the breach take place here, as in *Jackson v. Spittal*, and *Denham v. Spence*, and thus the decisions will appear quite consistent and reconcilable.

I have not lost sight of the suggestion that the first clause as to "the cause of action," refers to torts only. But it is not necessary to confine the first clause

to torts; as if a tort be committed, the cause of action arises immediately, I presume in the place where committed. And certainly the Courts of Common Pleas and Exchequer do not appear to confine it to torts.

Do you suppose that if the contract in *McGiverin v. James* had been made by plaintiff in Liverpool, with defendant, to deliver iron to him in Hamilton, our Courts would hold that they had no jurisdiction? I hardly think they would disregard the decisions of the Courts of Common Pleas and Exchequer in the cases referred to.

In the case of a contract made in Ontario, no matter where the breach occurs, the jurisdiction is clear under the Statute; and the party who fails to fulfil his contract cannot complain if he is sued in a country where he engages to perform his contract, and where the loss arising from the breach can be more satisfactorily estimated.

Another question would arise, if a plaintiff having recovered here, upon a contract where the breach occurred here, were to sue upon the judgment in the Courts of another country—whether the judgment would be enforceable if the laws of that country did not recognize the rules of law upon which the judgment was founded to be just, or proper to be enforced.

Yours truly,

J. R.

*Law Society—Legislative Tickets of Admission?*

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—Is it right of the Law Society to insist upon a classical examination before placing Students for call upon the books of the Society, seeing that the Legislature of Ontario now permits so many to get over the fence without this test?

It would save a great waste of feathers if our tyros were only allowed to carry their plumes with them into the "Temple of Justice," instead of having them in so many instances rudely and ignominiously "plucked" off them at the threshold. This "plucking" process is a very cruel one at any rate, and the Law Society is now getting so advanced, that they might advance in a generous direction, and do away with these tests, instead of putting so many members of the



## CORRESPONDENCE—FLOTSAM AND JETSAM.

legal profession to the expense of an Act of Parliament.

Yours, &c.,  
OSGOODE HALL.

*Several Moot Points.*

TO THE EDITOR OF THE LAW JOURNAL.

SIR:—Permit me to submit for your consideration a "batch of queries."

1. Supposing that on a trial of a case in Division Court a verdict be entered for the plaintiff with leave to the defendant to move to enter a non-suit. Is such an application good if made *fifteen* days after the day of trial, or must it be made within *fourteen* days?

2. Does the right of precedence hold good where A., a barrister, and B., an articulated clerk, appear before the Clerk of the Crown to enter Records; or is the rule, first come first served, to apply? The point arose when entering Records for the Assizes just closed for York, and the poor clerk was ordered to give way.

3. In Country Causes, is a Deputy Clerk of the Crown justified in entering Records before the commission day of assize? The C. L. P. A. merely says they shall be entered before noon that day. How far, if at all, would the principle of Eng. Stat. 15, 16 Vic., cap. 73, apply? True our Judges are not attended by Marshals to receive Records, in the absence of which officer could the Deputy Clerks of the Crown be considered as such? The case of *Hingston v. Whelan*, 8 U. C. L. J., cannot be considered as settling the difficulty.

INOPS CONCILII.

[1. This question is now before one of the Judges of the Superior Court for adjudication.

2. We should hardly think there would be any right of precedence in such a case. A barrister, as such, has nothing to do with entering Records. That is the appropriate work of the attorney or his clerk.

3. We are not aware of any authority to enter such records before Commission day.]

*FLOTSAM AND JETSAM.*

The death of the celebrated Siamese twins has caused the following curious reflections on the part of a lay contemporary: "It is a very fortunate thing that the Siamese twins were law-abiding citizens. Had they not been they would have given the authorities no end of

trouble. In fact, it seems to us that they could have committed all sorts of crime with impunity, had they been so inclined. If Chang had committed an assault, how would it have been possible to have arrested him without arresting Eng also; and had Eng been entirely innocent of all participation in the affair, why should he have been arrested? In order to punish the guilty, it would have been necessary to punish the innocent also; and locking up Chang would have included locking up Eng. We do not see any way out of the dilemma that would have arisen except a temporary one; and that is the confining of Eng as a witness. But when it came to punishing the guilty party, justice would have been nonplussed, for the law does not permit an innocent party to suffer for crimes he had not committed. If Eng, on the other hand, had perpetrated a murder, he could never have been hanged, no matter how strong and conclusive the evidence had been against him. He could not have been imprisoned for life, for in these instances it would have necessitated the death or the life-long confinement of the unoffending Chang, who, having a separate identity, could have obtained a writ of *habeas corpus*, and demanded his liberty. Had one of these twins been a rogue, he would have, therefore, caused no end of embarrassment to the officers of justice. If Chang were drunk and disorderly in the streets, what policeman could have arrested him without laying himself open to a charge of false imprisonment from the unoffending Eng? Had these twins been evil-minded, and conscious of the perplexities they could have originated, there is no knowing what might have happened. The law would have been powerless, for vice must have triumphed and virtue been oppressed, or, virtue triumphed and vice gone unpunished. Twins of this description are by no means desirable under such possible contingencies."

Lord Norbury hated a bill of exceptions almost as much as he did a nonsuit. On this subject a remarkable scene occurred between him and O'Connell. To appreciate it we must recollect that they detested each other, and we must picture to ourselves O'Connell lowering and raging as the Judge smiled and sneered. Daniel, to Norbury's great dissatisfaction, tendered his bill of exceptions to the Judge, which, if he refused, subjected him to a heavy penalty. "You're surely not in earnest, Mr. O'Connell?" "I never was more in earnest in my life," said Daniel, bowing both lowly and leeringly, "I hope I know my duty to the

## FLOTAM AND JETAM.

Court." "No man knows it better, or performs it better—Jackson, call the next case." "May I, my Lord, without offence, request your signature to the bill of exceptions!" "Offence, offence, Mr. O'Connell! you never offended me in your life—nor anybody else, I do believe. You're too good-natured and good-humoured a man—and *you look it*." "Oh, my Lord, let me at least implore of you to spare your compliments." "Truth, truth, Mr. O'Connell—and you know truth's no compliment." "Once more, my Lord, I very deferentially ask your signature—or *your refusal*. All I want is a categorical answer." "No doubt, no doubt, you'd be satisfied with a refusal. But I don't refuse you—indeed I don't think I could refuse you anything; so mind, I don't refuse, but I do nothing in a hurry; come to me in my chamber when the court rises—your time's valuable, and so it ought—your talents make it so." "My Lord, my Lord, you at least may spare me the infliction of your panegyric." Daniel departed, the victim of the Judge's cajolery; but Norbury in private gave the autograph, and saved at once the publicity and the penalty.

This reminds us of a story of a certain Judge in the Western part of the Province, who is said to have fined a Barrister for contempt of Court for objecting to his charge, (or rather what he was pleased to call his charge). The fine was paid, and some time afterwards the learned Judge, on thinking the matter over, gave the mulcted individual an order to get the money back. It is also said that the bewildered Barrister has ever since neglected his business in a vain endeavour to ascertain whether he was in fact fined, and if so, why; and further, why he paid the fine (if paid), and what authority the Judge had to order its return, and why he so ordered, or how otherwise.

Here and there, lingers a strong prejudice against Judge Taney for his decision in the Dred Scott case, and especially in New England, some of whose citizens object to the proposed portrait of the chief justice alongside that of Chase in the supreme court room; but Judge Nelson, upon whose memory so many honors are being bestowed, would have decided the same way. This same Judge Nelson, in the United States Supreme Court, on the Dred Scott case, quoted a very remarkable letter written by Judge Story in 1828, relating to a case analogous to that of Dred Scott. Judge Story was accustomed to write at least once a

year to Lord Stowell, sending him a copy of his judicial decisions, which the latter reciprocated. At length a case arose in the English court, (of which Lord Stowell was chief justice), where an Antigua slave was carried by his master to England, for temporary residence, and was subsequently taken back to Antigua. He brought suit for his freedom, and the inferior court decided against his right to freedom. In the appellate court, Lord Stowell, in behalf of a majority of the court, affirmed the judgment below. Lord Stowell sent the decision to Judge Story, who delayed replying so long, that Lord S. again wrote to him, expressing regret at not receiving a reply, and the hope that their pleasant correspondence, of so many years' standing, would not cease. To these letters, Judge Story replied as follows:

"SALEM, NEAR BOSTON, Sept. 2, 1828.

"To Rt. Hon. Wm. Lord Stowell:

"MY LORD—I have the honor to acknowledge the receipt of your letters of January and May last, the former of which reached me in the latter part of spring, and the latter quite recently. \* \* \* I have read, with great attention, your judgment in the slave case from the vice-admiralty court of Antigua. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called to pronounce judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which led to it in such a striking and convincing manner. It appears to me that the decision is impregnable.

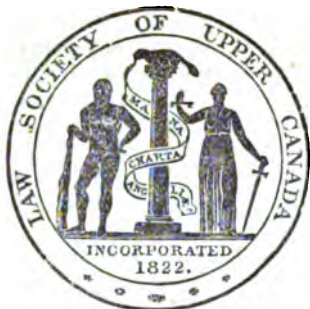
"In my native State (Massachusetts), the state of slavery is not recognized as legal, and yet, if a slave should come hither and afterward return to his own home, we should certainly think that the local law would reattach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America (where questions of this nature are not of unfrequent discussion), and I never have heard any other opinion but that of approbation of it, expressed among the profession of the law. I cannot but think that upon questions of this sort, as well as general maritime law, it were well if the common law lawyers had studied a little more extensively the principles of public and civil law, and had looked beyond their own municipal jurisprudence.

"I remain, with the highest respect, your most obedient servant.

JOSEPH STORY."

—*New York Express*.

## LAW SOCIETY—MICHAELMAS TERM, 1873.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, HILARY TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

- No. 1276. ROBERT HAMILTON DENNISTOWN.  
 " 1277. JOHN HENRY METCALF.  
 " 1278. J. HOWATT BELL.  
 " 1279. WILLIAM DRUMMOND HOGG.  
 " 1280. KENNETH MCLEAN.  
 " 1281. EDWARD MEER.  
 " 1282. EDWARD HARRY D. HALL.  
 " 1283. WILLIAM McDONNELL, JR.  
 " 1284. E. BURRITT EDWARDS.  
 " 1285. A. ELSWOOD RICHARDS.  
 " 1286. HENRY ARTHUR REMSOR.

The above named gentlemen were called in the order in which they entered the Society as Students, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

- WILLIAM DRUMMOND HOGG.  
 HENRY ARTHUR REMSOR.  
 WILLIAM G. MURDOCH.  
 J. HOWATT BELL.  
 E. BURRITT EDWARDS.  
 WILLIAM McDONNELL, JR.  
 ALBERT EDWARD RICHARDS.  
 FRANK D. MOORE.  
 EDWARD MEER.  
 ARCHIBALD MCKINNON.  
 GEORGE M. ROGER.  
 MORTIMER A. BALL.  
 JOHN MACGREGOR.

And on Tuesday, the 3rd February, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

- EDWARD POOLE.  
 ANCUS MARTIUS PETERSON.  
 WILLIAM MACBETH SUTHERLAND.  
 COLIN GEORGE SNIDER (as an Articled Clerk.)  
 LAFAYETTE ALEXANDER McPHERSON.  
 HENRY PETER MILLIGAN.  
 FRANK NICHOLLS KENNIN.

*Junior Class.*

- WILLIAM BEAIRSTO.  
 WILLIAM LEIGH WALSH.  
 DAVID BURKE SIMPSON.  
 CHESTER GLASS.  
 THOMAS P. GALT.  
 WILLIAM H. BEST.  
 ALEXANDER H. LEITH.  
 FREDRICK CANE.  
 JOHN KELLEY DOWSBLEY.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 20 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 48.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
*Treasurer.*

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR APRIL.

1. Wed...Collectors of last yr. to ret. rolls and pay over money (32 V. c. 36, s. 103). Master and Reg. in Chy. and Clks. and Dep. Clks. Crown to make quarterly return of fees.
2. Fri...*Good Friday*.
4. Sat...Last day for notices of primary examination.
5. SUN...*Easter Sunday*.
6. Mon...County Court Term begins.
7. Tue...Last day for return by Local Treas. to County Treas.
10. Fri...Last day for Master and Reg. in Chy. and Clks. and Dep. Clks. Crown to pay over fees to Prov. Treas. under 32 V. c. 36, s. 115.
11. Sat...County Court Term ends.
12. SUN...*Low Sunday*.
13. Mon...Storming of Magdala, 1868.
15. Wed...Prea. Lincoln assassinated, 1865. Assessors in Tps. and Villis. to complete rolls by this date (32 V. c. 36, s. 4).
19. SUN...*2nd Sunday after Easter*.
23. Thu...*St. George*.
25. Sat...Parliament Houses burnt, 1849.
26. SUN...*3rd Sunday after Easter*.

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## THE

## Canada Law Journal.

Toronto, April, 1874.

Several important changes have taken place in the Judiciary in England and Ireland. Baron Cairns has become Lord High Chancellor of England, in place of Lord Selborne, who went out with the Gladstone Government, and Sir John Karslake becomes Attorney-General. In Ireland, Lord O'Hagan, the late Lord Chancellor, bade adieu to the Bar on the 21st February last. He enjoyed a high reputation. Complimentary addresses were presented to him by the Bar and the Incorporated Society of Attorneys and Solicitors. His successor is the Right Hon. Abraham Brewster. Mr. Palles has been sworn in as Chief Baron of the Exchequer.

We are glad to learn that Mr. Walkem, whose treatise on the law relating to the execution of wills and to testamentary capacity has proved such a success, has ready for publication a small work on the Married Women's Property Acts of 1859, 1872 and 1873. It will consist of these Acts, with copious notes. The subject is not an easy one to tackle, and all we can say is, if he understands the law, it is more than any one else does. At least we are sure of this, that his book will be of great practical use, and doubtless throw much light upon many difficult points.

The United States Supreme Court, in *Stitt v. Hindekoper*, reported in the *Legal Gazette* of Philadelphia of Jan. 23rd, 1874, lays it down that it is a rule of presumption that ordinarily a witness who testifies to an affirmative, is to be preferred to one who testifies to a negative, because he who

## EDITORIAL ITEMS—ELECTION PETITIONS.

testifies to a negative may have forgotten a thing that did happen, "but it is not possible to remember a thing that never existed. The like rule was acted upon by the Court of Chancery of this Province in *Wright v. Rankin*, 18 Gr. 625.

One of the results of the English Judicature Act is seen in the appointment of an Equity Counsel, in the person of Richard Paul Amphlett, Q. C., to the vacancy in the Court of Exchequer occasioned by the resignation of Baron Martin. Nothing of the kind has happened since the appointment of Baron Rolph to that Court, but we may expect that the English Common Law Bench will henceforth be leavened with a continuing chancery element, in order that law and equity may be efficiently administered by the same Court. No doubt, a similar result may be looked for in this Province in consequence of the Administration of Justice Act.

The following judicial statistics are worth noting. During the year 1873, the English and Irish Judges who have died are Lord Westbury, Sir Wm. Bovill, Sir Wm. Channel, Sir John Wickens, Dr. Lushington, Chief Baron Pigott, and Mr. Justice Lynch. In the United States, Chief Justice Chase and Mr. Justice Nelson, of the Supreme Court. At present, the oldest Judge in England is Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer, aged 78; the youngest is Sir George Jewel, Master of the Rolls, aged 49. The oldest Judge in Ireland is Chief Justice Monaghan, of the Court of Common Pleas, aged 70; the youngest is Mr. Justice Morris, in the same Court, aged 47.

Chief Justice Thompson, of the Supreme Court of Pennsylvania, lately returned to the practice of his profession, and while engaged in arguing a case,

suddenly paused, and sinking back in his seat, in a few moments breathed his last. He commenced life as a printer, and from that position achieved the highest offices in his State. It is a singular circumstance that the case he was arguing, when arrested by the hand of death, was one on which, as Chief Justice of the Court, he had delivered judgment upon a former writ of error, and he was, in his last utterances, engaged in vindicating the opinion he had himself delivered. Among impressive scenes of a like solemn nature in Courts of justice, may be mentioned the death of Mr. Justice Talford, when in the middle of his charge to the jury.

It has been decided by a Court in one of the United States "on the wrong side of the Rocky Mountains," that shaving by a barber was not a work of necessity within the meaning of the usual exceptions to that effect in Sunday laws, and consequently that the tonsorial professor could not recover for services which were unlawful. A *dictum* to the same effect may be found in *Reg. v. Cleworth*, 9 L. T. N. S. 682, where the question incidentally arose on the argument as to the validity of a conviction against a farmer for work done on Sunday. Crompton, J., remarked, "I take the case of a man shaving another; the one who shaved would be liable, whilst the one who was shaved would not." To that, Mellish, Q.C., replied "that might come under the exception of a case of necessity." Whereupon Cockburn, C. J., observed, "judging from what we see all around, it can hardly be said that shaving is an act of necessity!"

## ELECTION PETITIONS.

Either the last elections for the House of Commons of Canada were conducted, in Ontario, in a most grossly corrupt manner, or else there is a wild striving after purity on the part of the defeated

## OMISSIONS IN THE ADMINISTRATION OF JUSTICE ACT.

candidates and their friends, hitherto unknown, for we find that, so far, out of eighty odd elections more than thirty are protested on the ground of bribery, corruption and "undue influence,"—(whatever that may mean). Some few of the petitioners claim the seat on a scrutiny, but the frightful expense attending such a course prevents many attempts of that kind. The practical working of the statutes shows clearly that a complete revision is absolutely necessary. For example, the present system of giving particulars is simply a provision for notifying the briber and the bribee to take a trip across the border for a few weeks, either for the sake of their health or at the call of urgent private business. Summary powers of preliminary and interlocutory examinations both of candidates and witnesses, so as to catch and cage the evidence, from day to day, must be given before the Act will be worth the paper it is written on. The name of the other amendments necessary is legion, but these we have not now space to discuss. We are inclined to think that many of these petitions will not come to a hearing. If they do, the prospects of the Bench and Bar for long vacation are somewhat lugubrious.

#### OMISSIONS IN THE ADMINISTRATION OF JUSTICE ACT.

All statutes involving extensive or even considerable alterations of the law are tentative in character. There has been a demand for reform, and the reformer sometimes overshoots the mark, sometimes falls short of it. Statutes for the "amendment of the law" as a rule require amendment themselves, in order to approximate the ideal and the actual benefits to be derived therefrom. It is but rarely, if ever, that such acts issue from the brain of the legislator in practical perfection: time and use develop the neces-

sity for many applications of the amending hand. Sheridan ridiculed the process by which the full measure of ultimate benefit is evolved from statute law, by a parody on "The house that Jack built." First, he says, there comes in a bill imposing a tax; and then comes in a bill to amend the bill that imposed the tax; and then comes in a bill to explain the bill that amended the bill to impose the tax; next a bill to remedy the defects of the bill that explained the bill, that amended the bill, that imposed the tax; and so on *ad infinitum*. But underlying this *persiflage* are the substantial truths that advantageous changes in the law are arrived at only by degrees, and that frequent short-comings almost necessarily precede satisfactory legislation.

It is in no spirit of fault-finding or captiousness that we proceed to point out some omissions and defects in the Administration of Justice Act of 1873. We have hitherto spoken of that Act as we think it deserves, in the language of eulogy, as being a substantial advance in so adjusting the machinery of the several courts that the relief any suitor is entitled to claim can be meted out to him without unnecessary delay or expense. But in some respects we are inclined to think that the Act might have gone further, with benefit both to the courts and the suitors.

In particular, the state of the law in regard to actions of ejectment, is at present very unsatisfactory. This form of action is full of anomalies which it would be well to remove. Until the recent Act 36 Vict. cap. 14, (which should have been incorporated with the Act for the Administration of Justice) no costs could be taxed in undefended actions of ejectment, unless by the circuitous process of proceeding to recover them in an action for mere profits: *Steen v. Steen*, 21 U. C. Q. B. 454. To counterbalance this peculiarity, we find that the courts

## OMISSIONS IN THE ADMINISTRATION OF JUSTICE ACT.

have jurisdiction to award costs to be paid to the successful party by one not a party to the record, where it is established that the stranger has instigated or is fostering the litigation and is the party really interested: *Thornton v. Wilkinson*, 9 Jur. N. S. 606; *Mobbs v. Vanderbilt*, 4 B. & C. 904; *Lutz v. Beadle*, 5 P. R. 418.

Again, the recovery in ejectment is by no means final, as is the recovery of a judgment in other less-favoured actions. The law is now as it was in ancient times. If John Doe was nonsuit, or if Richard Roe obtained a verdict against him, the effect was either that John Doe did not prosecute his then action, or that Richard Roe had not been guilty of the particular trespass alleged to have been committed on John Doe. By consequence whereof the irrepressible claimant could bring another action of trespass and ejectment, complaining to all appearance of another assault and ejectment, but in reality to try the very same title. And so, as a counterpoise to this anomaly, two expedients were devised, one by the Legislature, and the other by the Court of Chancery. By the Con. Stats. of U. C. cap. 27, sect. 76, the claimant in a subsequent action, who has failed in a former ejectment, may be ordered to give security for the costs of the then pending action. But even this salutary provision has been limited by the courts, as may be seen in *Armstrong v. Montgomery*, 5 P. R. 461, and *Bell v. Cuff*, 4 R. P. 155. If ejectments are brought repeatedly for the same thing, equity is wont to interfere and award an injunction, when the litigation appears to be carried on for the purposes of vexation and oppression: *Barefoot v. Fry*, Bunb. 158; *Irwin v. Sager*, 21 U. C. Q. B. 375.

The Administration of Justice Act has removed one limitation with regard to discovery in actions of ejectment. According to the latest exposition of Judge-made law before that Act, it was held that

in such an action the defendant was not allowed, in the absence of special circumstances, to interrogate the plaintiff as to the character or right by virtue of which he claimed title to the premises: *Provincial Insurance Co., v. Merhery*, 18 W. R. 583. The provisions of the Act in question, with regard to the examination of parties (sect. 24) do in effect bring back the law to the full measure of discovery that was held proper in *Flitcroft v. Fletcher*, 11 Exch. 543:—a case which the Barons of the Exchequer, aghast at their own boldness, took pains speedily to overrule in *Horton v. Bott*, 2 H. & N. 249. We see no reason, however, why the Common Law Courts should not have such power as exists in Equity procedure to permit the examination of parties after the defence is filed, instead of waiting till the cause is at issue. In this respect we venture to think the Chancery practice is preferable, in the interests of suitors, to the practice at law, under the provisions of this Statute.

We suggest, also, that in actions of ejectment, the plaintiff should be enabled to apply for an injunction against the defendant's committing waste or spoliation upon the premises in question. This has been entirely overlooked in the Administration of Justice Act. The law now is the same as when determined by *Baylis v. Legros*, 2 C. B. N. S. 316, in which it was held that the English Common Law Procedure Act of 1854 did not authorize the issuing of a writ of injunction in an action of ejectment. The provisions of the English Act are found in our Con. Stat. U. C. cap. 23, sects. 9-13. Under these sections it was at first held in this Province that injunctions could be obtained in ejectment, as in *Frazer v. Robins*, 2 P. R. 162. But it was held in *Lauder v. Wilkinson*, 7 U. C. L. J. 150, that after the English case referred to, the earlier Provincial decisions were no longer to be regarded.

## LAW SOCIETY—HILARY TERM.

We think that the law should be altered, and that a plaintiff, in ejectment, should be able to prevent, for instance, the cutting and removal of timber from the premises he seeks to recover without the necessity of filing a bill in Chancery therefor, which is now his only mode of getting complete relief against a wrong-doing defendant.

## LAW SOCIETY.

## HILARY TERM—37 Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:

*Monday, 2nd February, 1874.*

The several gentlemen whose names are published in the usual lists were called to the Bar, and received Certificates of Fitness.

The petition of Mr. A. G. M. Spragge, to be allowed an Examination passed by him for call to the Bar, in Easter Term, 1873, his time on the Books as a Student not having then expired, was refused.

The Treasurer announced the result of the Intermediate Examinations.

*Tuesday, 3rd February, 1874.*

The abstract of balance sheet for the year 1873, with the report of the Auditors thereon, was laid on the table.

The Report of the Examining Committee was received and adopted.

The petitions of Messrs. McPherson, Milligan and Kennin for admission to the Society, under the special circumstances stated in their petitions, were allowed.

The letter of Mr. David Lennox was considered.

The petition of Mr. Gormally, a member of the English Bar, for the consent of the Society to a special Act being passed for his admission as an Attorney, was refused.

Mr. Edward Martin was elected a Benchman in the place of Mr. Freeman,

and Mr. Clarke Gamble in the place of Mr. E. B. Wood.

*Saturday, 7th February, 1874.*

Mr. George M. Evans was appointed Examiner for the next Term, and his fee for this Term was directed to be paid.

The sum of fifty dollars each was ordered to be paid to Messrs. Osler and Rae, the auditors for 1873, for auditing the accounts of that year.

The sum of one hundred dollars was ordered to be paid to Mr. Æmilius Irving for auditing the accounts of 1871 and 1872.

Mr. John S. Ewart was appointed auditor for 1874, in the place of Mr. Osler, who retires, having served two years.

The usual examinations for Call, Certificate of Fitness, and admission of Students and Articled Clerks, were ordered to take place as usual before Trinity Term.

*Friday, 13th February, 1874.*

The statement of Revenue and Expenditure for the last year, in accordance with 35 Victoria, chapter 6, was laid on the table.

The draft of the deed of surrender to the Crown was perused and accepted, and the Treasurer and Messrs. Patterson and Mackenzie were appointed a Committee to confer with the Government on the subject of the agreement for lighting and heating Osgoode Hall, and the grant of \$2,000 promised to the Society in 1873.

Mr. J. B. Clarke's letter was read, and he is allowed to compete for the second year Scholarship in November, 1874.

The Report of the Committee on Reporting was received, read and adopted.

The Report of the Library Committee was received, read and adopted, and the Treasurer was authorized to pay for the valuation of the Library on the certificate of the Chairman of the Committee.

It was resolved that it be a rule of the Society, that in the computation of time



## LAW SOCIETY—CRITICISMS ON REPORTERS.

entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the student or clerk, and all students entered on the Books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

On motion made, resolved, that the third clause of the Report of the Committee on Reporting be communicated by the Secretary to the Reporter of the Court of Chancery.

On motion made, resolved, that the Attorney-General be requested to introduce a Bill during the present Session of Parliament, amending the section substituted for the 57th section of chap. 35 of the consolidated statutes of Upper Canada, so as to make the penalty therein mentioned apply to attorneys practising in the County Court.

J. HILLYARD CAMERON,  
Treasurer.

### CRITICISMS ON TEXT-WRITERS. REPORTERS, AND OTHER LEGAL AUTHORITIES.

Dr. Allibore, of Philadelphia, (famous for his elaborate "Dictionary of Authors") wrote a pamphlet some few years ago on the subject of "Bibliography," in which he maintained that a critical manual of legal bibliography is a great desideratum in the literature of the law. Such a book, containing a list of all law-works in the English language, or applicable to the English system of law, with references to the reports where they are cited, and with critical estimates of their value and correctness, would be of great value to bench and bar. Such a treatise is a thing well-nigh to be despaired of by any

single author in this fast-living and fast-writing age. We do not say entirely to be despaired of, because we remember the wonderful monument of patience and research which Mr. Bigelow, of Boston, has reared in his "Index of Over-ruled Cases;" but still few (if any) lawyers would be willing to devote the requisite time and labour demanded for such an undertaking. Yet much may be done by the gradual accretion of materials for such a work by contributors to legal journals, and it is with this view that we are desirous to add our little collection of criticisms to others which we have from time to time published. Some few reporters, omitted from our former papers, are now inserted; and as before, we have endeavoured not to repeat notices that have been heretofore printed.

BEAWES' *LEX MERCATORIA* "is frequently referred to by all text-writers, and treated as a book of eminent authority:" per Mallin, V.C. in *Re Overend*, L.R. 6 Eq. 364.

BELL'S COMMENTARY ON THE LAW OF SCOTLAND. "A work of which it is difficult to speak in terms of adequate commendation," 18 Law Mag. 17.

BENJAMIN'S TREATISE ON THE SALES OF PERSONAL PROPERTY: "appears to be very ably written": Lord Chelmsford in *Shepherd v. Harrison*, 20 W. R. 3.

BEST ON EVIDENCE. "One of the best works on our laws": Willa, J. in *Briggs' case*, 1 D. and B. Cro. Ca. 102.—"A very valuable text-book": Stuart, V.C., in *Sidebottom v. Adkins*, 3 Jur. N.S. 632. "a very remarkable book": Stuart, V. C., in *Mariett v. Anchor Ins. Co.*,—8 Jur. N. S. 52.—"A very valuable treatise": Willa, J. in *Hollighan v. Head*, 4 C. B. N. S. 391.

BLACKSTONE'S COMMENTARIES. "I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority; he would have been very sorry himself to hear the book so cited; he did not consider it such: Lord Chan. Redesdale in *Shannon v. Shannon*, 1 Sch. and Ref. 327. Blackstone's positions have been frequently overruled; as for example in *Liddard v. Keim*, 2 Bing. 183; *Richardson v. Gray* 29 U. C. Q. B. 344.

## CRITICISMS ON REPORTERS—REPEATING OF TELEGRAMS.

**BROWN'S PARLIAMENTARY CASES.** Mr. Brown only made abstracts from the appeal cases lying on the table of the House, and therefore the grounds of the decision can not be known from the abstract of the case in Brown: Per Lyndhurst, Lord Chan. when referring to *Bouchier v. Taylor*, 4 Bro. P. C. 708 in *Barra v. Jackson*, 5 Law Times, R. 365.

**BULLER'S NISI PRIUS.** The author procured his materials from Mr. Justice Bathurst: 17 Law Mag. 27.

**CROMPTON'S PRACTICE.** "Many of the cases were partly collected by myself before I was at the bar; they were never intended by me for publication, and were too loose to be relied upon: Per Buller, J, in 5 T. R. 372.

**DARBY AND BOSANQUET ON THE STATUTE OF LIMITATIONS.** "A very useful book:" Per Willes, J., in *Wilkinson v. Verity*.

**ESPINASSE'S REPORTS.** "It used to be said that Mr. Espinasse heard one half of the cases and reported the other half": Pollock, C. B., in *Whyman v. Gath*, 22 L. J. N. S. Exch. 317. The observations of Denman, C. J., in *Small v. Nairne*, 13 Q. B. 840, as to the want of accuracy in this reporter, so that his reports were wont to be quoted with doubt and hesitation and even apology, were adopted by Coleridge, J., in *Wenman v. Mackenzie*, 1 Jur. N. S. 1016.

**FONBLANQUE'S NOTES** to the "Treatise on Equity" attributed to Mr. Barlow are executed with consummate ability: 22 Law Mag. 61.

**FOSTER'S CROWN LAW.** "Sir Michael Foster was a judge eminently versed in criminal law: *Queen v. Charleton*, 2 Irish L.R. 65.

**GALE ON EASEMENTS.** "A very excellent book:" Per Campbell, C. J., in *Renshaw v. Bean*: 18 Q. B. 124; "An excellent treatise": Per L. Wensleydale in *Rowbottom v. Wilson*, 8 H. L. C. 359.

**GILBERT ON REPLEVIN.** "Is a book of the very highest authority:" Per Burton, J., in *Kenny v. Simpson*. 4 I. R. L. R. 44.

**GILBERT ON USES.** "It is known that the book was a posthumous work, and not presented in the form in which the Chief Baron intended it to be made public, and it is possible he might have made considerable alterations, if published in his lifetime; and it bears marks, particularly in the latter part of it, of being incomplete:"

Bomilly, M. R., in *Barron v. Wadkin*, 27 L. J. Ch. 124.

**HALE'S HISTORY OF THE COMMON LAW.** This book was published from a posthumous manuscript of the learned Judge, and is exceedingly cursory and defective: "*Barton, Convey*, cited in Greenleaf's Over-ruled cases, p. 204.

**HARGRAVE.** Mansfield's case cited by Mr. Hargrave, although by an unknown hand, yet the adoption of it by Mr. Hargrave makes it an authority: Per Hart, L. C., in *Power v. Sheil*: 1 Moll. Ch. R. 312.

**JARMAN ON WILLS.** Mr Jarman's work is one of great value. It has followed what was begun by Mr. Roper, begun by Mr. Powell, improved by Mr. White, and by Mr. Jarman himself brought to a surprising degree of perfection. Mr. Jarman has, upon a deliberate consideration of cases in his chambers, endeavoured to extract certain rules of construction to guide in considering the language of testators; but it is quite possible to attempt to do a great deal more than it is in the power of any human being to accomplish in that respect: per Stuart, V. C., in *Conduitt v. Soane*, 4 Jur. N. S. 502.

## SELECTIONS.

CONCERNING REGULATIONS  
REQUIRING TELEGRAMS  
TO BE REPEATED.

It is an established principle of law that telegraph companies, like railroad companies, have the right to make reasonable regulations for the conduct of their affairs, but there is some diversity of opinions as to what regulations are "reasonable," and as to whether, and, if so, how far, they relieve the company from liability for negligence. Most companies have adopted regulations to the effect that they will not be responsible for mistakes in transmitting, or delay in delivering a message unless such message is repeated, and these regulations are usually printed on the blanks on which messages are written. How far such regulations, so notified, are binding upon the sender, has been considered in the following cases:—

*McAndrew v. The Electric Telegraph Company*, 17 C. B. 3 (1855), presents the earliest discussion of this subject. In that case the plaintiff sent a message to

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defendant's office to be transmitted to Exmouth, directing the master to proceed to Hull. In transmitting the message "Southampton" was, by mistake, substituted for "Hull," in consequence of which the vessel went to the former place, and the plaintiff sustained loss in the sale of her cargo. The blank on which the message was written contained a provision that "the company will not be responsible for mistakes in the transmission of unrepeatable messages, from whatever cause they may arise." The plaintiff's message was not repeated. The court held the regulation reasonable. The declaration was on the contract to send the message as delivered, and the question of how far such a regulation would relieve the company from its own negligence was not presented.

*Camp v. The Western Union Telegraph Company*, 1 Metc. (Ky.) 164 (1858), was likewise an action on the contract, and it was therein held that a regulation requiring a message to be repeated was reasonable, and if brought home to the knowledge of the sender would preclude him from recovering damages occasioned by a mistake.

In *N. York and Washington Telegraph Company v. Dryburgh*, 35 Penn. St. 298 (1860), the action was on the case, and the court was called upon to decide how far the ordinary notice as to repeating messages relieved the company from liability for their own negligence. There a person wrote a message on a blank containing such notice, requesting plaintiff, a florist, to send him "two hand bouquets." The transmitting operator, in mistaking "hand" for "hund," changed the message so as to read "two hundred bouquets," and it was sent to the plaintiff. The jury found for the plaintiff, and the judgment on the verdict was affirmed by the District Court in banc—Sharswood, P. J., delivering the opinion—and by the Supreme Court. The mistake did not occur from the "infirmities of telegraphing," but from the carelessness of defendants' agent.

Sharswood, P. J., in his opinion said: "As to the private notice of the defendants, that they only insured the correct transmission of messages where they are repeated back and paid for as such, we do not think it applies here, for many reasons. It was not brought to the know-

ledge of the plaintiff (the plaintiff, it will be remembered, was the receiver of the message), and, if it had been, could not have exempted the defendants from liability for actual negligence. . . . What the company, the defendants, insure against, when they do insure, is not the negligence of their officers, but those delays and mistake in the transmission which are unavoidable."

*Seilers v. Western Union Telegraph Company*, a brief note of which was given in 3 Am. Law Rev. 777, is similar, in facts, to the above case. The plaintiffs sent by telegraph an offer of 55 cents per bushel for salt delivered "at our city wharf." When received at the office of destination it read "at rour city wharf," and the operator, supposing *rour* to mean *your*, changed the despatch accordingly. The plaintiff lost in consequence, and brought an action. The District Court of New Orleans held the company liable for the error, notwithstanding the message was written on a blank containing a provision against liability except for a repeated message. In both these cases it should be observed that the damage occurred through unauthorized changes made in the messages by defendants' operators, and that, at least in Dryburgh's case, the mistake would not have been obviated by repeating.

In *Birney v. The New York & Washington Telegraph Company*, 18 Maryland, 341 (1862), plaintiff delivered to defendant, at Baltimore, a message to be sent to New York, directing plaintiff's agent to sell certain stocks. Through the negligence of the operator at Baltimore the message was never sent nor attempted to be sent. There was a notice posted conspicuously in the defendants' office that the company would "not be liable for any loss or damage that might ensue by reason of any delay or mistake in the transmission or delivery, or from non-delivery, of unrepeatable messages." The message in question was not to be repeated. The court held that the terms of the notice did not cover the case; that the company had contracted to put the message upon its transit, and having made no effort to do this was liable for the damages occasioned. This decision covered the entire case, but the court went on to lay it down broadly that one employing a telegraph company to transmit

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a message is bound by the regulations of the company, whether brought home to his knowledge or not. This part of the decision is clearly *obiter*.

In the *United States Telegraph Co. v. Gildersleve*, 29 Maryland, 232 (1868), the above dictum is re-asserted, although quite unnecessarily. There Gildersleve left a message at defendants' office, in Baltimore, to be sent to New York. It was written upon the blank of another company having upon its face this:—"The following message, without repeating, subject to the conditions indorsed on the back." What these conditions were does not appear in the report, except that they were intended to relieve the company from liability in case of non-repeated messages; but whether for delay or mistakes in transmission, or for non-delivery, also, is not apparent. The party to whom the message was directed failed to get it; but from what cause the case does not clearly inform us; but we gather from the argument of plaintiff's counsel that it was from a failure to deliver it after it had reached the New York office. It appeared that the defendant had regulations as to repeating similar to those on the message sent. The court held that neither the conditions on the message nor their own regulations would relieve the company from their own wilful misconduct or negligence; that such negligence must be established before there could be a recovery, and that, as the court below had refused defendants' prayers for instructions based upon this assumption, a new trial should be had. There was nothing calling for a decision as to whether the plaintiff would have been bound by the defendants' regulations without being made aware of them, since the plaintiff, in having written his message upon the blank of another company, very clearly made the conditions thereon his own, and proffered them with his message—and, as must be presumed, with a knowledge of them.

In the case of *Ellis v. The American Telegraph Co.*, 13 Allen, 226 (1866), the sole question was, as stated by Chief Justice Bigelow, "whether that portion of the terms and conditions prescribed by the defendants is reasonable and valid which provides that the defendants will not hold themselves responsible for errors and delays in the transmission and de-

livery of messages, unless they are repeated." The mistake in this case consisted in making the message read \$175, instead of \$125, as it was written. There was "no evidence of carelessness or negligence except the error in the sum, which was made by some agent of the company in transmission." The court held the regulation as to repeating the message reasonable; and that one injured by a mistake in an unrepeatable message could not recover, beyond the amount paid for sending the same, without some further proof of carelessness or negligence on the part of the company than that resulting simply from error; that is, that there must be proof of negligence distinct from the "natural infirmities of telegraphing;" and the judgment, which was for the plaintiff, was reversed, on the ground that, under the circumstances, the plaintiff ought to have shown carelessness on the part of the company, and that, as the message was not repeated, negligence could not be inferred (as the court below had instructed) from the mere fact that a mistake in the sum had been made.

In *Wann v. Western Union Telegraph Company*, 37 Mo. 472 (1866), the plaintiff delivered to defendants a message directing salt to be sent by "sail;" the message when delivered, read "rail." The blank on which the message was written provided that the company would not be responsible "for mistakes or delays in the transmission of unrepeatable messages from whatever cause they may arise." Of this condition the plaintiff had actual knowledge when he delivered his message, and the court held the condition reasonable and the plaintiff bound by it. The report informs us that the only evidence introduced on the trial to sustain the charge of carelessness was the mistake above stated. So that the case is "on all fours" with the *Ellis* case, but, as in that case, the court stated that the company would not be protected by their regulations from the consequences of their own gross negligence.

In *Bryant v. The American Telegraph Co.*, 1 Daly, 575 (1866), the loss occurred through a delay in delivering the message after it was received at the office of destination. The company was fully informed of the importance of the message and of its prompt transmission. There were the usual regulations as to repeating, to guard

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against "mistakes or delays in transmission." The company was held liable.

In *De Sutte's Case*, 1 Daly, 547; 30 How. Pr. 403 (1866), the injury occurred through an alteration in transmission of "twenty-two" to "twenty-five." The company had regulations relieving them from liability for unrepeatable messages, but this despatch was not written on a blank of the company containing the ordinary conditions, and the court held that the plaintiff was not bound by such conditions unless they were brought home to his knowledge.

In *Western Union Telegraph Company v. Carew*, 15 Mich. 626 (1867), regulations as to repeating were held to be reasonable, and binding upon one who writes his message upon a blank containing such regulations, whether he reads them or not. In that case there was no evidence of negligence upon the part of the company.

In *Sweetland v. The Illinois, etc., Telegraph Company*, 27 Iowa, 432; 1 Amer. Rep. 285 (1869), rules requiring messages to be repeated were held to be reasonable, but it was also held that such rules would not be so construed as to exempt the company from liability for a loss occasioned by its own fault or negligence, or for want of proper skill or ordinary care on the part of its operators in transmitting an unrepeatable message. In such case, however, the burden of proving negligence is put upon the plaintiff.

In *Graham v. Western Union Telegraph Company*, 1 Colorado, 730 (1871), the damage occurred through a failure to deliver the message after it had been received at the office of destination. There were the usual regulations as to repeating, but the court held these regulations not applicable to the case, and that the company was liable. This is in accordance with the ruling in *Gildersleeve's case*, and in *Bryant's case*, and, by analogy, with the doctrine in *Birney's case*.

In *True v. The International Telegraph Company*, to appear in 60 Maine (1870), it was held that a regulation that the company will "not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message beyond the amount received by said company for sending the same," would not protect the company from liability for its own misfeasance or negligence.

In *Breese v. The United States Telegraph Company*, 48 N. Y. 132; 8 Am. Rep. 526 (1871), the commission of appeals decided that regulations of a telegraph company as to repeating are reasonable, and that where a person writes a message upon a blank containing such regulations, he will be presumed to know and consent to them. The error, in that case, was in making "700" read "7,000," the precise cause of which error was unknown—as the case states. There was no evidence of negligence beyond the fact of the mistake, and the court was not called upon to decide, nor did it attempt to decide, whether the company might relieve itself by such conditions from liability for injuries occasioned by its own negligence.

From this review of the case it appears that a majority of the authorities hold that regulations of a telegraph company relieving them from liability, unless the message is repeated, are reasonable, but will not be construed so as to relieve them from liability for injuries occasioned by their own wilful misconduct or negligence.—*Albany Law Journal*.

The Supreme Court of Illinois, in the recent case (February 7th, 1873,) of *Tyler v. The Western Union Telegraph Co.*, 5 Chic. Leg. News 550, Breese, J. have decided that a Telegraph Company cannot restrict its liability by the printed writing as to repetition, &c.,—but our own courts have rather followed the majority of the authorities as stated in the above article. For two recent decisions in our District Court upon the subject, see *Harris v. Western Union Telegraph Co.*, *Legal Intelligencer*, January 3rd 1873, Mitchell, J., and *Pasmore v. Id.* *Legal Int.*, January 31st, 1873, Haro, P. J.—*The Legal Intelligencer*.

## TRADING PARTNERSHIPS WITH MARRIED WOMEN.

In France, "where nothing but the Monarchy is *salique*," writes Parson Yorick, "the legislative and executive powers of the shop not resting in the husband, he seldom comes there—in some dark and dismal room behind, he sits commerceless in his thrum night-cap, the same rough son of nature that nature left him." This department, with sundry

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others, having been ceded totally to the women, Monsieur *le Mari* is little better than the stone under your foot—"a figure of 9 with the tail cut off," to use the polite periphrasis for a cypher applied to one of the Tichborne witnesses, at the recent notorious Newcastle meeting—a mere tolerated negation, like poor Mr. Tibbs, whose relative significance in Mrs. Tibbs' boarding house has been formulated by Boz:—"He was to his wife what the 0 is in 90—he was of some importance *with* her—he was nothing *without* her." Do they, then, order these matters better in France? Would it be a desirable consummation to cultivate a similar state of things by Act of Parliament? Does Mrs. Mantalini really need to be elevated to a vantage of yet greater ascendancy, upon a collection of sympathetic statutes of the realm? Whither, indeed, will not Mr. Hinde Palmer's powers of amendment ultimately lead us? May the result stop short of realising a pretty general concurrence in the paradox of Hugo de Bohun, in "Lothair," that all women—but no man—ought to marry. Indeed, of a bill very similar to that which was introduced by Mr. Palmer, Lord Penzance observed that, if it passed, it might be dubious how far there would remain any inducement to the male moiety of the community to enter into so perilous a contract as matrimony would then become. Yet, what may not the next session bring forth?—for, saith the old legend, the nineteenth century is to be the "century of women." Already, the Married Women's Property Act (1870), has placed its protégés in the position equivalent to that which Madame enjoys in France, under what the French code calls the *régime de biens séparés*; and doubtless, many advantageous suggestions towards extending that Act might be derived by sending a judicious traveller into other regions, as remote from us in customs as in latitude, where the Amazons prevail and the tornado is rampant. At all events, it is obvious that the progressive spirit of modern innovation will not stop short at such halting improvements as those contemplated in the Married Women's Property Act (1870) Amendment Bill, to which we have adverted, a measure, indeed, though it was, as has been observed, only needing a clause for the purpose of hav-

ing married couples registered under the Limited Liability Act. Admitted ills the Act of 1870 unquestionably did redress, and we are very far from quarrelling with it in detail; but, exceptional ills are ill-cured by remedies that convulse the constitution at large; and, before impetuously medicating ourselves with experimental Amendments, it is interesting, to say the least of it, to contemplate what would be the probable operation of the proposed panacea. On this point, however, we need not here recapitulate in full what may be found by referring back to a paper on "Man and Wife (Limited)," at p. 106 of this volume; and, for our present purpose, it will suffice to re-transcribe one passage from the *Saturday Review*—"The wife may either go into business with her husband, or, if she likes, she may start a rival shop and carry off his customers. If she provides the greater part of the capital, she will, no doubt, claim priority in the firm, and 'Smith and Husband' may possibly become a familiar sign. A lady who finds the dull routine of domestic duties wearisome, will be at liberty to seek excitement on the Stock Exchange, or go shares with cousin Charley in a racing stable. If the family accounts get into confusion, husband and wife will have the opportunity of bringing actions against each other. Each will, of course, have a separate banker and solicitor," &c. There is, indeed, nothing, apparently, to prevent a baron and femme from living together if they choose, and without wrangling—if they can; but may they, as here suggested, enter into a contract with one another for mutual participation in trading profits and losses—can Mrs. Doe, despite the protestations of her John, enter into partnership with Peter Stiles? What are the legal bearings of coverture in relation to trading co-partnership in particular?

By the common law, married women were disabled from entering into binding contracts, or from engaging in trade. They were, accordingly, incapable of entering into contracts of partnership, whether for trading or other purposes; holding themselves out as partners would not subject them to the responsibilities attaching to other persons so acting; and, if *de facto* partners, nevertheless, it was their husbands, and not themselves, who

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should be considered as sustaining that character in point of law. When it happened that, under positive covenants, they were entitled to shares in banking houses, &c., their husbands were entitled and became partners in their stead. "The right of a married woman or of her husband," it is observed, "to vote in respect of shares held by her has not been judicially considered. Speaking generally, however, and without reference to the regulations of any particular company, it would seem that, if the shares belong to her as part of her separate estate, her husband has no right to vote in respect of them, and her vote is valid, notwithstanding his disapproval thereof. But, if the shares do not form part of her separate estate, she alone cannot in point of law be a member in respect of them, and cannot, therefore, vote; nor is her husband entitled to vote in respect of such shares, until he has become a member of the company in respect of them. Nor does it follow, from the fact that he is subject to liabilities in respect of his wife's shares, that he is entitled to the privilege of voting in respect of them." (1 Lind. Part. 575, 3rd ed.) The principle that marriage operated as an assignment to the husband of the wife's share in a partnership is forcibly exemplified by the decision of *Nerot v. Burnand*, 4 Russ. 260, 2 Bli. N. S. 215; and see *Wrexham v. Huddestone*, 1 Swanst. 517 n., holding that the marriage of a feme sole partner operated as a dissolution of the partnership. This doctrine proceeds upon the ground that, in the absence of express agreement to the contrary, the marriage operated against the principle of *delectus personarum*, or the consent of the parties, by the introduction of a stranger into the partnership. It has, indeed, been treated by Collyer, and by other text-writers of authority, as only taking effect as a dissolution at will, but we rather incline to hold with Dixon that, in this case, the partnership (apart from the statute law, of which more hereafter) would be dissolved *ipse facto*. And it would seem to follow that, if the business were continued by the other co-partner and the husband, an entirely new partnership would be constituted between them. We are not aware that the question has ever arisen as to what would be the effect, as regards a partnership, of the

marriage of a feme sole partner with a man who is *civiliter mortuus*. But, it will be borne in mind that a married woman, in such case, is competent to contract, and would be bound by the contracts of a partner. It may also be noticed here that, by the custom of London, a feme covert, trading without the interference of her husband, was considered in the city courts as a sole trader. Collyer infers thence that she might also trade in partnership. We would rather incline to hold, however, that an authority to involve herself in the complex transactions, responsibilities and duties of partnership, would not necessarily be imported, from her husband's consent that she should carry on trade as sole, unless, indeed, the trade could not otherwise be carried on either necessarily, conveniently or beneficially. We find similar laws, with respect to trading by married women, in France, Holland, Spain, Louisiana, &c. And, by-the-bye, it is said by Collyer that, when a husband and wife are partners in a foreign country where it is competent for them to contract in partnership, it would still be incompetent for them to sue in this country as partners. We should certainly think that this doctrine is not maintainable as a doctrine of public law; neither is it by any means borne out in its full latitude by the case of *Cosio v. De Bernales*, 1 C. & P. 266, n., Ry. & M. 102. In this country it followed, *a fortiori*, from the principles to which we have adverted, that, at common law, a husband and wife could not enter into a contract of trading partnership with one another. Could they do so in equity? There, if the wife have separate estate, she is regarded as a feme sole. And since debts and obligations incurred by her either expressly or impliedly on the credit of that estate could be enforced against it, although not against her personally, there seems no reason why it should not be liable for the debts of a partnership, or why, in a limited sense, she should not be considered as a partner. Then, as between husband and wife themselves, the doctrines of equity have also gone very far, as in *Woodward v. Woodward* 8 L. T. N. S. 749, where it was held that a married woman was entitled to sue her husband for money lent to him out of her *separate estate*, the Lord Chancellor observing that, "The old

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common law has been entirely abrogated, and the power of the wife to contract with the husband has been fully established." So that we should think that the separate estate of a married woman would be liable for the debts of a partnership *in respect of it* between her and her husband, and that, in a limited sense and in a Court of Equity, she should be considered as a partner in such a partnership.<sup>6</sup> "Whether at law, the husband of a married woman entitled to a share in a partnership for her separate use is liable as a partner, is a question," it has been observed, which, so far as the writer was aware, "has not been judicially determined; but, if the wife holds her share herself and not in the names of trustees, the husband will, it is conceived, be a partner in respect of such share. There are, indeed, cases in which it was decided that when a married woman was a shareholder in a company, and was herself registered as such, her husband was not liable either to be made a contributory, on the winding up of the company, or to be sued by *scire facias* by a creditor thereof. But these cases turned on particular statutory enactments, and do not by any means determine the general question above suggested." 1 Lind. Part. 3rd ed. 86.

On many of the points we have mentioned, the Married Women's Property Act (1870), we need hardly say, has now an important bearing, as, indeed, will be sufficiently obvious by a mere statement of the terms of the first section alone; but our space will only permit us to advert to one or two matters in connection with it. That section provides, in effect, that, in respect of the wages and earnings of any married woman acquired or gained by her after August 9, 1870, "in any employment, occupation or trade in which she is engaged or which she carries on separately from her husband," and also as to any property acquired through the exercise of any "literary, artistic, or scientific skill," such married woman is to be placed in the position of a feme sole in respect of the beneficial enjoyment of such property. And by this Act as to such property, a married woman has acquired a personal legal status, with power to contract and to pursue legal remedies, free from the incapacities consequent on coverture. It appears to us that since

this statute as to any partnership respecting industries, &c., within the terms quoted, there would no longer be any reason why the marriage (before or after the passing of the Act) of a feme sole partner should dissolve the partnership. This statute is a remedial one, and, although in derogation of the common law, should be construed so as to suppress the mischief contemplated and to advance the remedy. We hold, then, that, in respect of property as specified, a married woman may now be a partner; but as to whether she may be a partner with her husband, we were at first view inclined to hesitate, notwithstanding the terms of the section quoted. We think, however, that this statute does not enable her to engage in or carry on a partnership with her husband. And although, as we have seen, a different impression appears to prevail, neither do we think that an Amendment Act, only so wide in terms as that which was contemplated by Mr. Palmer, would achieve this object. So, under a statute of Massachusetts, which provides that a married woman may sell her separate property, enter into any contracts in reference to the same, and carry on any trade or business on her sole and separate account, in the same manner as if she were sole, it has been held that a woman may belong to a trading partnership if her husband is not a member thereof, but not if he is a member: *Plummer v. Lord*, 5 All. 460, ib. 481, 9 ib. 455; *Lord v. Parker*, 127; *Lord v. Davison*, ib. 1313; *Edwards v. Stevens*, ib. 315. We confess that, for our part, we should not desire it otherwise; even though the law in this respect may not be finely calculated to promote hymeneal commerce between money-bags, and although it may ruffle the current of true love between those of whom it is written that, "if their goods and chattels can be brought to unite, their sympathetic souls are ever ready to guarantee the treaty."—*Irish Law Times*.

#### PRODUCTION OF TELEGRAMS FROM THE POST OFFICE.

The decision of Mr. Justice Grove, with reference to the production in evidence of copy telegrams in the custody of Her Majesty's Post Office, will be received with unmixed satisfaction. The applica-



## PRODUCTION OF TELEGRAMS FROM THE POST OFFICE.

tion made to the learned judge was of a very peculiar character. Mr. Charles Russell, as counsel for the petitioners at the pending trial of the Taunton Election Petition, asked the interference of the judge for the purpose of obtaining from the Post Office not any specific telegraphic message, but the telegrams *en masse*, which passed through the office at Taunton during a stated period of time. Mr. Justice Grove, though not doubting in his own mind what answer he ought to make to this request, consulted his brother election judges, and, having been fortified by their opinion, refused either to interfere to compel the production of these telegrams, or even to say anything to the officials at the Post Office to procure their production. Upon this application and the judgment thus given we must first observe that, apart altogether from the question of public policy involved, no judge and no Court of Law or Equity, could, in the face of the recent case of *Crouther v. Appelby*, 43 Law J. Rep. N. S. C. P. 7, on which we commented last week, venture to compel by threat of fine or imprisonment any servant of the Crown to produce any document contrary to the orders of the Crown as expressed through the proper officer. If the secretary of a railway company can refuse with impunity to produce a document because his masters have prohibited him from doing so, *a fortiori* would a servant of the Crown be protected. Probably, also, it would be held that copy telegrams in the custody of the State stand upon the same footing as secrets of State, State papers, and communications between Government and its officers. But it might be that the Post Office authorities would declare themselves ready to act exactly as the judge might in the exercise of his discretion direct, thus throwing the responsibility of production or non-production on the judge. Evidently this probability was in the mind of Mr. Justice Grove, when he expressed his opinion that he ought not even to say anything to the Post Office officials to procure the production of the copy telegrams. Assuming this to be the position taken up by the Post Office officials, we come to the question whether it is expedient or proper that copy telegrams *en masse* should be produced from the custody of the Post Office in a Court of Jus-

tice. We are not speaking of messages identified by the names of the parties by and to whom they have been sent, but of the whole lot of messages transmitted through a particular office in a given space of time. Telegraphy has opened up many new questions of law and policy, but such a question as this can be resolved on principles trite and familiar. Where the Government provides public means of communication open to all persons, and prohibits private enterprise directed to a similar object, the Government by implication pledges itself to the duty of keeping secret that which is entrusted to it for the purpose of communication. We need not recall the debates which arose on the conduct of Sir James Graham as Home Secretary in disregarding this rule, and disclosing the contents of the Mazzini letters seized during transmission through the Post Office. But between the interception and disclosure of a letter and the revelation of a telegram there is no sort of distinction. The Legislature also has expressed its opinion very clearly on the subject. By 26 & 27 Vict. c. 112, s. 45, a penalty not exceeding 20*l.* was imposed on any person in the employ of a telegraphic company improperly divulging the purport of a message; and by 31 & 32 Vict. c. 110, s. 20, any person in the Post Office disclosing the contents of a telegraphic message, contrary to his duty, is declared to be guilty of a misdemeanour punishable with twelve months' imprisonment. In reliance on the general principle already stated, and on the recognition of it by the Legislature, thousands of persons send telegraphic messages which could not be revealed to the public without damage to the feelings, the reputation, and the property of the senders, the receivers, or third parties; and it is manifestly better that election petitions should break down, actions at law fail, and honest defences collapse, than that such public mischiefs as these should be encountered. The proposition made at Taunton that the mass of telegraphic messages should be examined by one counsel on either side, betrays a very clear appreciation of the objectionable nature of the proposal made to the Court.

It is further to be observed that the application for the production of telegrams *en masse* is really an application not for evidence, but for discovery of evi-

C. L. Cham.]

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dence; and discovery from utter strangers to the matter *sub judice* is altogether unknown to the law. A *subpoena duces tecum* presupposes knowledge of the existence of a particular document, and ability to specify and define the document. Here it was not known or proved that there were any telegrams which could or would ultimately be made evidence in the cause. There was no more than an expectation that something might turn up. But in a suit between A and B no Court has jurisdiction to call upon C, a mere stranger to the parties, to discover all papers in his possession, for the purpose of seeing whether by chance he has some document relating to the matter in issue.

Clear as we take the case to be against applications of this sort, and much as we welcome the decision of the judge refusing this particular one, we believe that in the trial of at least one election petition—that at Coventry—some use of telegrams not altogether unlike to that desired by counsel for the petitioners at Taunton was allowed. We have not the material for an exact account of what was done on that occasion, but probably the cases are distinguishable. At any rate we may take it that for the future the judges will follow the precedent established by Mr. Justice Grove.—*Law Journal*.

## CANADA REPORTS.

### ONTARIO.

#### COMMON LAW CHAMBERS.

(Reported by Mr. H. J. Scott, B.A., Student-at-Law.)

#### McMASTER V. BEATTIE.

*Defence for time—Striking out false plea—34 Vict. cap. 12, sec. 8.*

*Held*, that a plea pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. cap. 12, sec. 8, and leave given to sign final judgment.

This was an action on a promissory note, plea—payment. After issue joined, plaintiff examined defendant, under sec. 29 of Administration of Justice Act, 1873, when defendant admitted that he had not paid the note, and that the defence was put in only to gain time. An application to strike out the plea and all subsequent proceedings, under sec. 8 of 34 Vict. cap. 12, and enter final judgment, was granted.

[March 7, 1874.—Mr. DALTON.]

This writ was on a promissory note, and the plea payment. The plaintiff joined issue on this plea, and then, under the Administration of Justice

Act, obtained an order to examine one of the defendants. At the examination this defendant swore that the note had not been paid—that the defence was merely put in for time—and that he had given instructions to his attorney to put in this same defence for the other two defendants.

Under these circumstances the plaintiff obtained a summons to strike out the plea, and set aside all subsequent proceedings, with costs against the defendants, on the ground that the plea was for the purpose of delay.

D. B. Read, Q. C., showed cause. The Courts had no jurisdiction before the Administration of Justice Act to entertain an application of this sort, and that Act does not give them jurisdiction. There is no rule of law requiring pleadings to be verified by affidavit, except in cases of abatement, and allowing this application would be equivalent to introducing such a rule. The Courts have continually held that they will not try the truth of pleadings by affidavits on chamber applications: *Smith v Blackwell*, 4 Bing., 512; *Nutt v Rush*, 4 Exch., 490; *Levy v Raillon*, 14 Q. B. N. S., 418; *Ravestorm v Gandell*, 15 M. & W., 304; *Phillips v Claggett*, 11 M. & W., 84; also Archbold's Q. B. Practice, pp. 292—297, and *Gibson v Winter*, 2 N. & M., 737. Section 8 of 34 Vict. cap. 12, under which this application is made, was intended only for the case provided for in the former part of the section; that, namely, of several pleas being pleaded; and the whole section should be read and construed together. Even if meant to apply to the case of a single plea, in this case the plaintiff having joined issue, and thus having admitted the plea to be a good one, cannot now come in and try to set it aside. As to the intention of the Administration of Justice Act in giving power to examine, the 24th, 25th, and 29th sections must be read together, and from them it is very evident that the examination is to have reference only to matters to come into question at the trial of the cause. If the Legislature did not mean this, why did it give the power to examine only after issue joined? It will be a fraud on the statute, if it is turned to this use. The effect will be to do away with defences for time; and although it may be a question whether this would not be a good thing, still the Court ought not to do so without the express direction of the Legislature, as it will create a very great change in the practice of the Court.

J. K. Kerr, contra.—The plea is a fraud upon the Court, and ought not to be allowed to stand. Under the Common Law Procedure Act, sec.

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119, there might perhaps be some doubt as to the propriety of striking out the plea, as that only gave power to strike out pleas "so framed" as to embarrass or delay. But the Common Law Procedure Amendment Act, 34 Vict. cap. 12, goes further, and gives power to strike out any plea upon the ground of embarrassment or delay, and thus extends to the whole plea, and not merely to its form. As to the rule before the Administration of Justice Act, that the Court would not decide as to the truth of pleadings regular in form previous to the trial, the reason was, that it might not be put to the trouble of deciding between conflicting affidavits, and also that there might be no temptation to a defendant to put in affidavits on which he would have no cross-examination. This does not now apply, as there are no conflicting affidavits, and the evidence is taken in the same way as at a trial. There always was at Common Law, irrespective of statutory enactments, a rule that the Court would strike out sham pleas, the only difficulty being the proving them to be sham: Ch. Arch. Prac., pp. 292-297, and the cases there cited; *Gordon v. Hassard*, 9 Ir. C. L. Rep., appendix, 21; *Stokes v. Hartnett*, 10 Ir. O. L. Rep., appendix, 20 *Bank v. Jordan*, 7 Ir. Jur. N. S., 28; *Leathly v. Carey*, 8 Ir. C. L. Rep., appendix, 1; *Nutt v. Rush*, 4 Exchequer, 490. As to their having pleaded over this is a case of the discovery of new facts, and we have availed ourselves at the very earliest possible moment of the power of obtaining the information. The Legislature has not given this power until issue is joined, in order to prevent its being used as a means of discovering some defence, and also that it might not come to be used as a matter of course, and thus greatly enhance the expenses of a suit.

Mr. DALTON.—This is an application to strike out the plea of the defendants, on the ground that it is false and merely for delay.

The action is against the maker and two endorsers of a promissory note. The plea by all the defendants is payment before action. Issue was joined by the plaintiff on the plea. Since then the plaintiff has caused the defendant, Beattie, the maker of the note, to be examined under the Administration of Justice Act of 1873, and this is his examination.—"I am one of the Defendants. I made the promissory note sued on in this action for \$420. I made it in favor of Mr. Robbs, I think. I know that he and O'Dwyer are endorsers on the note. I know that the plaintiffs are the holders of his note. I did not pay this note, nor did

the other defendants. I gave instructions to defend this suit for all three defendants. The object of the defence is to gain time to pay the amount. The whole amount, \$420, and interest, is still due from the Defendants to the plaintiffs."

Upon this the plaintiff has moved to strike out the defendants' plea as false and pleaded for delay, upon the admission of the defendant himself made in the suit.

I think I ought to make the summons absolute.

At one time, undoubtedly, it was considered that the Court had a jurisdiction to strike out the plea of a defendant, and allow the plaintiff to sign judgment where it manifestly appeared that the plea was false. *Rickly v. Proome*, 1 B. & C., 286, was a case of this kind. There, to a declaration for use and occupation, the defendant pleaded that he had delivered certain named goods to the plaintiff, as "satisfaction." The plea was struck out, upon an affidavit that it was false—the defendant not filing any counter affidavit. I believe that this is not the law now, and that the Court at this day does not feel that it has jurisdiction to force the defendant to verify his plea by affidavit, or to try on affidavits the truth of the plea—the law having assigned a different tribunal for such trial. This was settled by *Mornington v. Becket*, 2 B. & C. 81, and *Smith v. Backwell* 4 Bing., 512. These cases have been followed ever since, and no doubt the result from the cases of the present law is correctly stated in Arch. Prac. 11 ed, 291, that "the Judge will not interfere and strike out a plea upon the mere ground of its being false, although the plaintiff swear that it is in every respect so." Thus in *La Forest v. Langa*, 4 D. P. C. 642, a defendant pleaded that the bill sued on was outstanding in the hands of a third person, and upon affidavit that the plea was wholly false, and a production of a letter of the defendant in proof of it, in which the defendant requested from the plaintiff time for payment, it was said by Lindal, C. J., on a motion to strike out the plea,—"It is a plea upon which issue may be taken, and if we were to allow this rule, we should in effect be trying the case upon affidavit."

All this relates to pleas on which a single issue may be taken, and the reason which runs through the cases is this alone, that to strike out such a plea is an assumption by the Court of the power to try on affidavit that which, by the law, is to be tried by jury.

But there is another class of cases, viz., those where, from the form or substance of the plea,

a distinct and single issue cannot be taken, and in such cases it has always been the practice to strike out pleas manifestly false. 4 Ex. 490, and 14 Q. B. 418 are cases of this kind. The cases are numerous. A single instance will show how far the Courts have gone, and how much the falsity of the plea has influenced the mind of the Court beyond all other considerations. In *Smith v. Hardy*, 8 Bing. 435, to debt on a judgment, the defendant pleaded a release under seal, which had been destroyed by accident. The Court allowed the plaintiff to sign judgment on an affidavit that the plea was false; but it will be observed that here the plea was good in form and substance.

The present case, as it seems to me, stands clear from all these. I am not asked to try the truth of the plea upon affidavit, and it is not necessary to say that I could act upon the most conclusive and indisputable evidence, out of the cause itself, of its falsity. As to two of the defendants, they are not active in the defence. The defendant, Beattie, alone instructed the defence; and in his examination in this suit he says, in effect, the defendants owe the plaintiff all he claims, that the plea is false to his knowledge, and was pleaded for delay. Then, if I can look at this examination (and why should I not), what is there to try? And when we read of sham pleas, false in fact, what are such if this be not? All the difficulties which occur in such cases as I have cited seem to be removed by the fact that there is nothing left to try; and to allow the defendant to force the plaintiff to the expense and delay of proving at a trial that which the defendant himself asserts, in this cause, to be the truth, is to be passive where action is required, to allow the forms of law to be abused in the face of the court, and that which was meant solely for a defendant's protection to be perverted to inflict the merest injustice upon the plaintiff.

The Irish cases I have been referred to show that the Courts there are much more ready to act in striking out a false plea than the Courts in England; indeed, they treat a plea that is plainly false as necessarily a sham plea.

I therefore make the summons absolute, to set aside the plea, and for leave to the plaintiff to sign final judgment.

*Order accordingly.*

## NOTES OF RECENT DECISIONS.

### ABERNETHY V. BRÉDOME.

*Satisfaction piece—Signing before Attorney in the United States.*

[February 25, 1874—MR. DALTON.]

In this case a satisfaction piece was executed before a practising attorney in the United States, and the attorney's affidavit made before a notary public. Order applied for to enter same on roll.

*Held*, that signing before a practising attorney in the United States is a sufficient compliance with Rule 64, and order accordingly.

### ELMSLEY V. COSGRAVE.

*Examination under A. J. Act Sec. 24—Clerk's affidavit for order.*

[March 10, 1874—MR. DALTON.]

In this case, the affidavit for order to examine under A. J. Act was made by managing clerk of attorney, and stated, "I am familiar with all the proceedings in this suit."

*Held*, that although a managing clerk's affidavit is sufficient under the statute, still it must state that he has some particular charge of the suit.

### MCCRUM V. FOLEY.

*Amendment under A. J. Act—Penal action.*

[March 11, 1874—MR. DALTON.]

This was a penal action against a magistrate. The notice required by section 10, Con. Stat. U. C. cap. 126, stated that the plaintiff intended bringing his action in one of the Superior Courts, while the writ was issued in the other. On an application to amend under the A. J. Act:

*Held*, that under the statute these forms could not be departed from, and that it could not be amended as if merely formal.

### QUEEN EX REL. O'REILLY V. CHARLTON.

*Amendment under the A. J. Act—Quo Warranto proceeding.*

[February 24, 1874—MR. DALTON.]

In this case, the fact of the relator being a candidate or a voter, who had voted or tendered his vote as required by sec. 131, 36 Vict. cap. 48, was omitted in the relation, but was contained in one of the affidavits filed.

*Held*, that the fact being already before the court, the relation could be amended under the A. J. Act.

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## CHANCERY CHAMBERS.

(Reported by T. Langton, Esq. M.A., Barrister-at-law.)

## WILSON V. BLACK.

*Computation of time—Con. Order 273, 406.*

[The REFERENCE, Dec. 8.—The CHANCELLOR, Dec. 17.]

Replication was filed on the 9th of October. The sittings of the court were on the 30th.

*Held*, that replication was filed three weeks before the sittings.

If the time when the plaintiff should join issue is not three weeks before the next hearing term at the place where the venue was laid, the defendant cannot succeed on a motion to dismiss.

## PAXTON V. JONES.

*Cross-examination—Affidavit on production—Con. Order 268.*

[Jan. 23, 1874.—The REFERENCE.]

An affidavit on production is not within the provisions of Order 268, and therefore the party making it does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Order 138.

Only one examination of a party under Order 138 can be had.

## LONG V. LONG.

*Sequestration—Con. Order.*

[Jan. 30, 1874.—The REFERENCE.]

To entitle a party to the issue of a writ of sequestration for non-payment of money, it is not now necessary to show that the order for payment and a demand thereunder have been personally served on the party ordered to pay.

## MURCHESON V. DONOHUE.

*Contempt—Married woman—Liability to attachment—35 Vict. c. 16, Ont.*

[February 17, 1874.—The REFERENCE.]

A married woman, a defendant, living with her husband, was ordered, as administratrix of a former husband, to bring certain accounts into the Master's office, in a suit in which her husband was joined as a co-defendant. On an application to commit her for disobedience of the order, it was contended that the rule laid down in *Maughan v. Wilkes*, 1 Chy. Ch. 91, that the husband must answer for his wife's de-

fault unless he showed some ground of exemption, was in effect abrogated by 35 Vict. c. 16 (Ont.), which renders married women liable for their separate engagements in certain cases.

*Held*, that sec. 8 of this Act was not applicable in the present case, where the marriage took place before the passing of the Act, and that the other sections did not affect the rule.

It was also contended that the reason for the rule in this instance was wanting, as it was shown that the married woman was a woman of great force of character, and not, *in fact*, under the control of her husband.

*Held*, that the husband must satisfy the court that he has used his best endeavours to get his wife to obey the order before he will be discharged from his liability to attachment.

## BENNETTO V. BENNETTO.

*Partition Act—32 Vict. c. 33 (Ont.).*

[March 16, 1874.—BLAKE, V. C.]

The Partition Act of 1869 only applies to cases in which some common title in the petitioner and respondents to the land in question is admitted.

Where it appeared, from the statements in the petition, that two of several respondents claimed to be entitled absolutely to part of the lands sought to be partitioned, and that the petitioners contested such claim,

*Held*, the proper mode of proceeding as against these respondents was by bill in the ordinary way.

## HAMELYN V. WHITE.

*Production—Communications between solicitor and client—Documents in use in business.*

[March 9, 1874.—STRONG, V. C.]

Communications between solicitor and client are privileged, no matter at what time made, so long as they are professional and made in a professional character. (*McDonald v. Pulnam*, 11 Gr. 258 not followed.)

The following clause in an affidavit on production was *held* a sufficient statement of the nature of the document produced:—"I object to produce the documents set forth in the second part of the first schedule, on the ground that, being communications between solicitor and client, they are privileged."

A defendant was ordered to permit the inspection by the plaintiff of books in daily use in the defendant's business, which he objected to produce on that account, but which he was willing to produce at the hearing.

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Documents formerly in the possession of the defendant, and filed by him in a Master's office in another suit, were directed to be produced by defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of court.

## LEONARD V. CLYDESDALE.

Representative to a deceased party—Con. Order 56.

[March 2, 1874.—THE RAVENNA.]

A bill was filed against an executrix *de son tort*, charging that she had sold the personal estate of the deceased and applied the proceeds in the purchase of certain lands, and praying that she be declared a trustee thereof for the next of kin, and, if necessary, that the estate of deceased be administered.

An application was made under Con. Order 56 for the appointment of some person to represent the estate in the suit, on the ground that there was no personal estate outstanding, and the appointment in this way would save expense.

The motion was dismissed, it being held that the deceased was not "interested in the matters in question in this suit," and therefore the case was not within the provisions of Con. Order 56; and no account having been taken of the personal estate it could not be said that the personal representative of the deceased would be a merely formal party, for a balance might be found due from the defendant to the estate, which it would be the duty of the personal representative to administer.

## ENGLISH REPORTS.

## \*REG. V. COOTE.

*Deposition on oath of a prisoner—Admissibility in evidence—Criminating questions—Ignorantia juris—Caution to witness—11 & 12 Vict. c. 42, s. 18.*

By an Act of the Quebec Legislature, certain officers called "Fire Marshals" are appointed with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and the depositions made at the inquiry before the Fire Marshals were admitted as evidence against him.

\* Present: The Right Hon. Sir JAMES W. COLVILLE, Sir BARNES PRADOCK, Lord Justice MELLISH, Sir MONTEAGUE E. SMITH, and Sir ROBERT F. COLLIER.

Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted.

The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, excepting so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*Nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary.

The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed—*Ignorantia juris non excusat*.

The statute (11 & 12 Vict. c. 42, s. 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them.

[29 T. Rep. 111—March 18, 1873.]

By the Consolidated Statutes of Lower Canada, c. 77 s. 57, it is provided that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench. By s. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen.

The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment and order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the said court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

The present appeal was from a judgment of the appeal side of the Court of Queen's Bench for the Province of Quebec, Canada, on a case reserved for that court by Badgley, J., under the powers of the above statute, on the trial of the respondent for arson.

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The case so reserved was as follows :—

"The prisoner, Edward Coote, was indicted or arson of a warehouse in his occupation, and belonging to Alexander Roy.

"The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company ; second, to defraud the Royal Insurance Company ; the third to defraud generally ; and the fourth to injure generally ; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, in this present month, before a competent jury empannelled in the usual manner, and, after evidence adduced by the Crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence, and after his said objection had been overruled by me—after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in terms following :"

The case then set out the two motions, of which the first is immaterial, as Badgley, J., rejected it, and reserved no question respecting it ; the second was in the following terms :—

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons :"

Twenty-one reasons were then set out, the only ones material to the present appeal being in effect that the two depositions were inadmissible in evidence, because the said Fire Commissioners, before whom they were taken, had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that he, the said judge, though himself considering the reasons given insufficient to support the second motion, yet, as doubts might be held by the Court of Queen's Bench as to the legal production of the said depositions, reserved it, and held it over for decision with reference to the admission of the said depositions by the Court of Queen's Bench, appeal side.

The Fire Commissioners, before whom the depositions were taken, are appointed under the provisions of two statutes of the Provincial Legislature of Quebec (31 Vict. c. 32, and 32 Vict. c. 29), under which Acts they are empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

The criminal law of England was introduced into Lower Canada at the time of the cession to the English, A. D. 1763, and the criminal law of England of that date still continues in force in the province of Quebec, Canada, except as it has been altered by Canadian statutes or imperial statutes applicable to Canada.

Previous to the year 1869 a statutable provision (Consolidated Statutes of Lower Canada, c. 77 s. 63) was in force, by which a power was vested in the Court of Queen's Bench, appeal side, if at the hearing of a case reserved they were of opinion that the conviction was bad, for some cause not depending on the merits of the case, to declare the same by its judgment, and direct that the party convicted should be tried again as if no trial had been had in such case ; but by a subsequent statute (32 & 33 Vict. c. 29 s. 80), passed by the Legislature of the Dominion of Canada shortly after the establishment of that confederation, for the purpose of assimilating the criminal procedure throughout the various provinces of the Dominion, that section was expressly repealed, and there were at the time of the respondent's trial statutable provisions giving right to a new trial in criminal matters, or regulating motions in arrest of judgment in criminal proceedings in force in the Province of Quebec, Canada.

On the 15th Dec. 1871, the reserved case came on for argument in the Court of Queen's Bench, appeal side, before Duval, C. J., and Caron, Drummond, Badgley, and Monk, JJ., and on the 15th March, 1872, the court gave judgment in the following terms : "After hearing counsel as well on behalf of the prisoner as for the

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Crown, and due deliberation had, on the case transmitted to this court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged, and finally determined by the court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect that in the opinion of this court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case, and that for the purpose of standing such new trial, he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day until duly discharged."

From this judgment Badgley and Monk, JJ., dissented.

On the 15th March, 1872, an application was made by the Attorney-General for the Province of Quebec, Canada, on behalf of the Crown, to the said Court of Queen's Bench, for leave to appeal to Her Majesty in Her Privy Council, and such leave was refused.

On the 10th May, 1872, special leave was granted by Her Majesty in Council to appeal from the said judgment of the said Court of Queen's Bench, of the 15th March, 1872.

Sir John B. Karlslake, Q. C. and Bompas for the appellant.—The depositions were properly received in evidence by the judge before whom the indictment was tried. They were admissible although made on oath, and although made by the prisoner as a witness whose attendance might have been compelled. At the time the depositions were taken, no charge had been made against the prisoner, and he had the right of refusing to answer questions tending to criminate him. The prisoner answered voluntarily, and Badgley, J., states that he "frequently exercised his privilege of refusing to answer certain questions." It was not necessary that the Fire Commissioners should caution the prisoner that statements made by him on the inquiry might be used in evidence against him. The statute

(11 & 12 Vict. c. 42 s. 19) relates only to proceedings before magistrates, and caution given to accused persons. There was no ground for moving in arrest of judgment; nor had the court power to grant a new trial, for the statute empowering the court to grant a new trial (Consolidated Statutes of Lower Canada, c. 77 s. 57) was repealed by 32 & 33 Vict. c. 29, s. 80, which gives no such power. They cited the authorities given in the judgment *post*, and further, 1 Taylor on Evidence, 743; Rose. Crim. Evidence, 62; Joy on Confessions, 62, 68; *Reg. v. Gillis*, 17 Ir. C. L. Rep. 512. Judgment was delivered by

Sir ROBERT P. COLLIER.—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J., (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officers named "Fire Marshals" for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an enquiry held in pursuance of this statute as to the origin of a fire in a warehouse, of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the records, but their lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accus-



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sation against him or any other person ; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the above-mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshal was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordship's opinion rightly), that the constitution of the court of the Fire Marshal, with the powers given to it, was within the competency of the provincial legislature ; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The Court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta, and indeed decisions, may be found upon it ; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed pronouncing any new law, but declaring what the law has always been if properly understood. In the case of *Rex v. Haworth*, 4 C. & P. 254, a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg. v. Goldshede and another*, 1 C. &

K. 657, Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In *Reg. v. Sloggett*, Dearl. C. C. 656, the prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case Jervis, C. J., observes : " The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg. v. Chidley and Cummins*, 8 Cox C. C. 365, Cockburn, C. J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition of Russell on Crimes (vol. 3, p. 418), thus reports a case of *Reg. v. Sarah Chesham* : " Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg. v. Garbett*, Den. C. C. 286, accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg. v. Scott*, D. & B. C. C. 47, seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting), that although, under the Bankruptcy Act then in force (12 and 13 Vict. c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the

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improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer incriminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat*. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Marshal had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the Court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court power to direct a new trial, has been repealed by the subsequent statute 32 and 33 Vict. c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given their Lord-

ships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

## EXCHEQUER CHAMBER.\*

ROWLEY, (EXECUTRIX, &C.) V. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

*Action under Lord Campbell's Act (9 & 10 Vict. c. 93)*—Death by negligent accident—Compensation in damages for value of deceased's life—Value of an annuity for a person's life—Mode of calculating—"Carlisle Tables"—Evidence—Skilled witness—Misdirection—Proper mode of directing the jury—Exceptions.

[May 14 and June 26, 1873.]

The plaintiff, as executrix of R., deceased, brought an action under Lord Campbell's Act (9 & 10 Vict. c. 93), against the defendant company, to recover damages from them on behalf of the mother, widow, and children of the deceased, whose death was caused by the defendants' negligence. It appeared at the trial that the deceased's mother was entitled to an annuity of 200*l.* a year during the joint lives of herself and the deceased, and which was secured by his personal covenant. The deceased was an attorney in practice, and at the time of his death was forty years old, his mother's age being then sixty-one. On the part of the plaintiff, a witness was called who stated that he was an accountant, and was "acquainted with the business of life insurance," and having referred to the "Carlisle Tables," which he stated were used by insurance offices for obtaining information as to the average and probable duration of human lives of all ages, he gave evidence as to the average and probable duration of the lives of two persons of the respective ages of the deceased and his mother; and also as to the sum of money for which an annuity of 200*l.* a year for the life of a person of the mother's age could be purchased.

Objection being taken by the defendants' counsel to the admissibility of this evidence, it was ruled by the Lord Chief Baron to be admissible.

In summing up the learned judge told the jury that "they might, if they thought proper, calculate the damages to the deceased's mother by ascertaining what sum of money would purchase an annuity of 200*l.* a year for a person sixty-one years of age, according to the average duration of human life;" and that "they might

\* Before BLACKBURN, KEATINGE, BRETT, GROVE, ARCHBOLD, and HORTMAN, JJ.

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also, if they thought proper, take as a guide in calculating the damages to the deceased's wife and children, that the probable duration of the life of a man forty years old, in the deceased's circumstances, was twenty-seven years and a fraction according to the Carlisle Tables."

Upon error, on a bill of exceptions to the ruling of the Lord Chief Baron in admitting the above evidence, and to his directions to the jury, it was.

*Held*, first (by Blackburn, Keating, Grove, and Archibald, JJ., Brett, J., dissenting, and Honyman, J., expressing no opinion on the point), that the average and probable duration of a life of the age in question was material and relevant to the question at issue, and could not be better shown than by proving the practice of a life insurance company, who learn it by experience, and that, therefore, the evidence objected to was admissible; and also (Brett, J., doubting) that the witness, though not an actuary, was competent to give the evidence, subject to remarks on its weight.

Secondly (per totam curiam), that the direction to the jury with reference to the calculation of the damages to the mother, was wrong for the following reasons respectively:—

By Blackburn, Keating, Grove, and Archibald, JJ. The direction was wrong, first, because it did not notice the fact that the annuity lost by the deceased's death was for the joint lives of the mother and her son, and was therefore of less value than one for her own life only; and, secondly, because the annuity was secured only by the deceased's personal covenant, and was, therefore, of less value than an annuity on Government or other very good security, to which latter the evidence given had reference.

By Honyman, J.—The direction was wrong on two grounds. First, as authorising the jury to fix the term for which an annuity is to be purchased, solely by reference to the average duration of human life, without taking into account the state of health and condition of the annuitant. Secondly, in allowing the jury to disregard the fact that the annuity lost by the defendants' negligence was secured only by the personal covenant of a professional man, and would therefore become practically valueless by his inability, through ill health or loss of business, to keep up the annual payments.

By Brett, J.—The proper and only legal direction to the jury would have been to tell them that "they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they con-

sider, under all the circumstances, a fair compensation," and therefore the direction complained of was wrong in leaving it open to the jury to give the utmost amount which they might think to be an equivalent for the pecuniary mischief done. *Bristow v. Sequeville* (5 Ex. 275; 19 L. J. 289 Ex. 3 Car. & Kir. 64); *Blake v. The Midland Railway Company* (18 Q. B. 93; 21 L. J. 233 Q. B.); *Armsworth v. The South-Eastern Railway Company* (11 Jur. 758), referred to, discussed and approved.

Thirdly (by Blackburn, Keating, Grove and Archibald, J.J., Brett, J., dissenting, and Honyman, J., expressing no opinion on the point), that the direction to the jury as to the mode of calculating the damages to the deceased's wife and children could not be construed as meaning more than that the probable duration of the life of a man of forty, in the deceased's circumstances, according to the "Carlisle Tables," was an element to be taken by the jury into consideration with the rest of the evidence, and, if that were so, it was unexceptionable.

Fourthly (by Blackburn, Keating, Grove, and Archibald, J. J.), that the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary; and, if there were such evidence, the party excepting ought to have placed it on the bill of exceptions.

[This case will be found reported at length in 29 Law Times Rep. N. S., 180.]

## UNITED STATES REPORTS.

### COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

#### CHRISTMAN V. BAURICHTER.

##### *Partnership—Shares.*

The assets of a partnership were distributed by a master, in proportion to the capital advanced by each partner. Exceptions were filed, upon the ground that the assets should be divided equally, but were overruled by the court, and the master's report confirmed.

Exceptions to master's report.

Opinion of the court by FINLETTER, J.

The capital invested was \$2,900, of which the plaintiff furnished \$2,000, and the defendant \$900. The business was unprofitable, and the assets are about \$1,400. The master distributed this sum in proportion to the capital advanced by each, and charged the costs equally.

The defendant excepts, 1st. Because the assets should have been shared equally; and 2nd.

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Because all the costs should have been imposed upon the plaintiff.

Articles of partnership are not intended to define all the rights and duties of partners *inter se*. Much is left to be understood and determined by general principles, which are always applicable when not clearly excluded.

They are to be construed so as to defeat fraud, and the taking of unfair advantages. Lindley on Part., pp. 841 and 843.

In the case before us, the articles of agreement provide that "the profits shall be divided equally." And in case of the dissolution of this copartnership, from whatever cause, the parties hereto agree to and with each other that they will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the copartnership are adjusted, and its debts paid off and discharged, then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them."

It is clear there can be no division of assets until they shall have made "a true, just and final account of all things relating to their said business, and in all things truly adjust the same." Not the least of the things relating to their said business, are the accounts of the individual partners with the firm. They are some of the affairs of the copartnership, the adjustment of which they have made necessary to a division of the assets.

There is no allegation that "equally" was omitted from the clause by fraud or mistake. We cannot interpolate it; for that would be adding to the written contract of the parties.

There is no ambiguity in the language used; and as it stands, we must apply the principles of instruction. "Divided," means divided according to law.

Partnership arises from a contract to join in lawful business, and to divide the profits and the losses. The controlling idea is a division of the profits. The courts have always held that a partnership existed whenever the profits were divided; even though the parties may have agreed otherwise.

It nowhere appears that a division of assets enters into the definition of partnership. That, indeed, could only work a dissolution. This should be kept in view when we consider the language of judges and text writers in reference to the "shares" of partners. That term in an active partnership could mean only a division of

profits or losses. In the settlement of the affairs after dissolution, its meaning could not be enlarged. It could not therefore include the capital. That must be distributed upon other principles, or by special agreement.

Capital is the conjoined means of each partner, to be used for a specific purpose. Its component parts should be none the less the property of the individual members when dissolution has occurred, because of the combination.

It may be considered well settled that "when there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn, the shares of the partners will be adjudged equal."

What follows from this? Equality in the thing created, in its objects, in authority, and in the profit and loss. It does not imply equality in the component parts of that by which the agreement of the parties was made effective. When the fabric is useless for the purposes of its creation, natural equity would suggest that to each should belong whatever he had contributed thereto. Any other rule would be a continuing temptation to him who had furnished the smaller part, to violate his duty as a partner, and thereby compel a dissolution.

Accordingly we find in Lindley on Part., p. 696, "when it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is, that losses of capital, like other losses, must be shared equally; but it is not meant that on final settlement of accounts, capitals contributed unequally are to be treated as an aggregate fund, which ought to be divided between the parties in equal shares."

When a partnership is created there are two distinct parties interested therein. 1st. The individual members. 2nd. The conjoined members or firm. The firm represents the capital. It is therefore debited with the amount paid in by each partner.

But there must be also an account for each of the members, in which he is credited with what he brings into the business, and debited with what he takes out of it.

These accounts show how they stand in relation to the firm, and to each other. Upon a final settlement they must be balanced just as any other. This would effectually preclude the possibility of an unjust distribution of the assets of the partnership.

In stating an account between partners, each should be credited with what he has brought into the enterprise, and debited with what he has taken out. If there is no evidence as to the

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amount contributed by them, the shares of the whole assets should be considered equal.

Upon dissolution after the debts are paid, the advances should be first paid, and then each partner should be paid ratably what is due to him in respect of capital upon the settlement of the accounts of all the partners. If there be a residue, it should be divided as profit in equal shares, unless otherwise agreed upon. The losses of capital, if not specially provided for, must be borne equally. Watson on Part., 285; Lindley on Part., pp. 623 and 827; *West v. Skip*, 1 Ves. Sr. 242.

The master has been governed in his distribution substantially by these principles. The costs of the proceedings have arisen from a difference of opinion upon the articles in reference to a division of the assets. In this no blame can be ascribed to either party; and therefore the costs were properly charged in equal portions.

The exceptions are dismissed.

## U. S. CIRCUIT COURT—MINNESOTA.

### RAHILLY v. WILSON.

#### *Warehouse Grain Receipts—Sale—Bailment.*

1. Where grain is stored in an elevator warehouse with the understanding implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price, or the same amount of grain of the like quality, but not the identical grain deposited nor grain from any specific mass, the transaction is a sale and not a bailment.
2. Sales and bailments stated.

[Minnesota, U. S., December, 1873.]

This was an appeal in bankruptcy from the decree of the district court, granting the relief prayed in the original bill of Rahilly, filed for himself and the other warehouse grain receipt holders, and dismissing the cross bill of the First National Bank of St. Paul.

The suit was brought in the district court to settle the title to twenty-one thousand five hundred bushels of wheat, or its representative in money, now lying in that court.

Geo. Atkinson & Co., and their successors, Atkinson & Kellogg, were engaged at Lake City as warehousemen and commission and forwarding merchants, during the fall of 1868, and up to December 8th, 1870, when they filed their petition in bankruptcy, and were adjudicated bankrupts.

The firm of George Atkinson & Co. was composed of George Atkinson alone until April 1st,

1870, when Kellogg became a partner. The old name was used until September, and was then changed to Atkinson & Kellogg, and so continued until their failure, at which time they had in their warehouse the wheat in controversy, which was taken possession of by the assignee in bankruptcy.

At the date of their bankruptcy, they had outstanding warehouse receipts issued to farmers to the amount of about thirty-five thousand bushels, representing Nos. 1 and 2 grades of wheat, and two receipts dated November 23, 1870, to the amount of twelve thousand bushels, issued as collateral security for the payment of three drafts given to pay an overdrawn bank account with their bankers, to the amount of ten thousand dollars. These two receipts were issued to the drawee named in the drafts, and they had been endorsed over to their bankers. They represented twelve thousand bushels of wheat, and are now held by the First National Bank of St. Paul, having come into its possession in the course of a transaction hereafter mentioned.

The complainant, a farmer to whom some of these receipts had been issued in behalf of himself, and the others holding receipts to the amount of thirty-five thousand bushels, filed this bill against the assignee, and seeks to appropriate the fund exclusively to the payment of their receipts. The bank, by stipulation, is made a party defendant, has answered the bill, and also filed a cross bill, alleging that it has, to the extent of its claim, a prior right to payment out of the fund in court.

Both suits were heard together in the district court upon proofs taken.

The complainant, Rahilly, and other owners, on whose behalf he sues, held receipts in the following form:

Not good unless  
Counterigned by  
Warehouseman.

LAKE CITY, Minn. . . . 1869

Warehouse of George Atkinson & Co.  
Rec'd in store, of P. H. Rahilly..bush No...Wheat

(Signed) GEO. ATKINSON & Co.  
. . . Per Atkinson.

The receipts issued by Atkinson & Kellogg were similar, with the addition of the words "subject to warehouse charges and advances," and an omission of the words "in store."

The proofs show that Atkinson & Kellogg were the owners of an elevator in Lake City, constructed in the usual manner, for the purpose of receiving, storing and discharging grain—the elevating machinery being propelled by steam. There are several similar buildings in the same city, and the proofs show that business

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in them is conducted in the same general manner. The wheat is brought in by the farmers and is either purchased and paid for at the time by the proprietors of the elevators, or received by them and receipts issued therefor, like the one above copied.

Wheat is classified or graded into what is termed No. 1. No. 2, and rejected. Wheat when received in either mode, is tested, graded, and put into a common bin, each grade being kept distinct, but all of the same grade is mingled together, and this is the invariable practice and known to be so. The warehousemen do not keep the identical wheat on hand for which receipts are issued, but sell and ship at their pleasure: at least, the evidence shows that this is the general practice. The receipts specify *no time for the delivery* of the wheat to the depositor, but the usage or custom is that the holder may select his own time for presenting them, and demand either the market price of the grain on that day, or the quantity and quality of the grain called for in the receipt. It is expected that the ticket-holder will give the warehouseman who issued it the first privilege of buying, if he will pay as much as the holder can obtain elsewhere. In the event of the holder selling to the warehouseman, the latter receives no storage, unless the grain has been carried over the winter; but if he demands grain, or if he sells the receipt to others, who demand grain instead of the market price or value, then the practice is to charge storage. The evidence shows that it seldom happens that the depositor demands grain, but almost invariably elects to take the money, that is the highest market rate of the grade of grain mentioned in the receipt on the day when he closes the transaction and surrenders the instrument. The warehouseman often makes advances on these receipts, charging interest.

The bankrupts, in addition to receiving wheat of farmers and issuing storage tickets as above, also purchased wheat for themselves under an arrangement with Eames and Co., of St. Paul, whereby the latter were to allow them a commission or compensation for their services, of two cents per bushel. Wheat thus purchased was paid for by the bankrupts' own checks on local banks, and the bankrupts reimbursed themselves by drafts drawn from time to time on Eames & Co., on account of wheat shipped to them. All wheat thus purchased was graded and put into its proper bin, mingled with wheat for which receipts or tickets were issued; and when shipments were made, the grain was taken from the amount in the elevator building. As wheat was

being constantly received and constantly shipped, the amount in the elevator fluctuated from week to week. In the summer of 1870, before the new crop of that year came in, the bankrupts' elevator was entirely cleared of grain, although many of their receipts, issued in 1869, were then outstanding.

The storage capacity of the bankrupts' warehouse was about 60,000 bushels, although the amount of wheat which was received, handled and discharged therefrom in a year largely exceeded this amount.

When they failed they had on hand 21,500 bushels of wheat, of which about 18,000 had been purchased within a week previous to the failure and mixed with grain then in the building. To pay for this 18,000 bushels, the bankrupts drew cheques on their local bankers, Williamson and Co., and between the 15th and 17th of November, 1870, drew in favor of these bankers three drafts on Eames & Co. for \$10,000, which were dishonored and returned to Williamson & Co., who demanded warehouse receipts as security, and on the 23rd day of November, when it was known that the bankrupts had stopped business, and were in failing circumstances, the bankrupts issued two warehouse receipts for \$12,000, which afterwards came into the hands of the First National Bank at St. Paul, as collateral security, with full notice of all circumstances.

The district court held that this transaction was an attempt on the part of Williamson & Co. to obtain from the bankrupts an illegal preference, contrary to the bankrupt act, and that the St. Paul bank was affected with notice thereof, and it accordingly dismissed the cross-bill of the last named bank, but decided that the ordinary receipt holders were entitled to the grain on hand at the time the petition in bankruptcy was filed. From the decree dismissing the cross-bill, the St. Paul bank appeals, and from the decree on the original bill, the assignee in bankruptcy appeals.

*E. C. Palmer & James Giffellan* for the assignee; *George L. Otis*, for the First National Bank of St. Paul; *Bigelow, Flandrau & Clark*, for the complainant, Rahilly.

DILLON, Circuit Judge.—The proofs satisfy me that the invariable and known course of business at the elevator warehouse in Lake City, was to mingle together all grain of the same grade, whether purchased outright and paid for at the time, or received on tickets specifying the grade and quantity, and which contemplate the future delivery of the like amount of the same grade of wheat to the holders of such receipts

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when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain; that it would be shipped and sold by the warehousemen, when the latter should deem it to be for their interest (for such was the uniform practice), and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the relation which exists between the grain depositor and the warehouseman? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence the grain at any time on hand belongs to the depositors to the extent of their receipts or tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the

ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases: *Chase v. Washburn*, 1 Ohio St. 244, 1853; *The South Australian Ins. Co. v. Randall*, Law Rep. 3 Privy Council Appeals, 101, 1869.

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (*Jones on Bailments*, 64, 102; *Story on Bailments*, sec. 439; 2 *Kent's Com.* 590.)

That this is a correct view of the relations between the wheat depositor and the bankrupts is expressly adjudged in the following cases, which, in their facts, are identical with the one under consideration: *South Australian Ins. Co. v. Randall*, *supra*; *Chase v. Washburn*, *supra*; *Loneragan v. Stewart*, 55 Ill., 44, 1870; *Johnson v. Brown*, *infra*. See *Myers v. Adams*, 8 Nat. Bankr. Reg. 214; *Stearns & Raymond* 26 Wis. 74.

Applying the principle above mentioned, the Privy Council in the case of the South Australian Insurance Co., in an elaborate judgment, decided, when corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim, at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes; that the transaction was a sale by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordships' judgment, Sir Joseph Napier says: "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt; \* \* \* that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, at the time of delivery, upon special terms of settlement: Law Rep. 3 Privy Council Appeals 109, 118.

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And so the supreme court of Iowa, in a case yet unreported, *Johnson v. Brown*, Oct. 1873,) has also held. In the case just cited, wheat was left in an elevator with the understanding that when the depositor should be ready to sell it, the proprietor of the elevator would give the highest market price or the same amount as wheat of like grade and quality—the custom being to ship off grain, but to keep on hand sufficient to fill outstanding storage receipts, but not the identical wheat received—and it was adjudged that the transaction was a sale and not a bailment.

I regard the case at bar distinguishable from *Young v. Miles*, 20 Wis. 615, 23 Wis. 643; and *Kimberly v. Patchin*, 19 N. Y. 330; and like cases where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations.

I am of opinion, therefore, that the court erred in holding that the receipt owners had the right to the wheat in the warehouse as against the assignee, and its decree in this respect is reversed, and a decree will be entered here dismissing the bill.

I may add, that I am entirely satisfied, in view of the mode of conducting business at the grain elevators, as shown in the testimony, that the foregoing is a sound view of the relation between the grain depositor and the proprietor of the elevator, and that legislation to protect the former against the insolvency of the latter, would appear to be called for.

In respect to the claim of the bank upon the two wheat receipts for 12,000 bushels, made by the bankrupts after their failure to secure \$10,000 to their local bankers, I concur so fully in the views of Judge Nelson that I do not deem it essential to do more than refer to his opinion. The decree of the district court, dismissing the cross-bill of the bank is affirmed. The cause will be remanded to the district court with directions to tax the costs in that court equitably as between the receipt holders and the bank. The costs on this appeal will be borne equally between the same parties.

*Ordered accordingly.*

(Note by the Editor of *Central Law Journal*.)

In *Chase v. Washburn*, 1 Ohio St. 244, the receipt of the warehouseman, was: "Milan, O., Nov. 5, 1847. Rec'd in store from J. C. W. thirty bushels of wheat. H. Chase & Co." The evidence *alunde* showing that the wheat was received with an understanding that the warehouseman might dispose of it, and that, upon demand, he would return other grain, or pay for that deposited, the transaction was adjudged a sale and not a bailment, and therefore it was no defence to the warehouseman that his warehouse was destroyed by fire

at a time when it contained wheat enough to answer all the outstanding receipts.

So, in the case of the *South Australian Ins. Co. v. Randall*, Law Rep. 3 Priv. Council App. 101, 6 Moore P. C. N. S. 341, as in the case to which this note is sub-joined, the receipts issued to the farmers by the miller were "to store," and under the circumstances stated in the foregoing opinion, the transaction was considered to be a sale.

In 6 Am. Law Review, 450, the reader will find a valuable article entitled "*Grain Elevators: the title to Grain in Public Warehouses.*" The case of *Chas. v. Washburn* is there printed in full, and is selected "as presenting the ablest exposition of the opposite opinion" to that which the annotator there maintains to be the true doctrine. In that note is cited, perhaps, every reported case on the subject of the title to grain in elevators which had been decided down to April 1872. The substance of that note will be found condensed in Holm's edition of Kent's Commentaries. 2 Kent Com. 12th ed. 590.

The case of *Rahilly, supra*, is one where there was an understanding implied from the known and invariable course of business, that the warehouseman might mingle the specific wheat deposited with other wheat of like quality, and dispose of it at his pleasure, with the further understanding that on demand, he would pay the depositor the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass. We have found no adjudged case which holds such a transaction to be a bailment, but there are several directly to the point that it is a sale. Such a case is obviously distinguishable from that of a specific deposit which is not to be changed by the warehouseman, but retained by him until called for by the depositor. This is a bailment. And the case is distinguishable, also, from those where specified amounts of grain of different owners is mixed by consent in specific mass, without any understanding that the warehouseman might dispose of the grain so deposited and mingled. And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it may be different from such a case, but it is doubtful whether it is so. See *Johnson v. Brown*, Iowa Sup. Ct., 1873. But where it is known by the depositor that the warehouseman is himself buying and selling grain on his own account, and also receiving grain "in store," and that he intermingles all that is so obtained, and is constantly buying, receiving and selling, so that the mass is constantly fluctuating, and there is no fixed time when the receipts are to be presented, it seems impossible to consider the holders of the outstanding receipts as tenants in common of the whole mass of wheat in the elevator in proportion to the amount of their receipts. And such a case seems to be the same in principle as an ordinary general deposit of money in bank; it creates simply the relation of debtor and creditor; and so the Privy Council in the case of the *Australian Ins. Co.*, above cited, considered it.

The very recent case of *Butterfield v. Lathrop*, 71 Pa. St. 225, goes upon the same principle. Here, Baxter and numerous other farmers delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in propor-



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WOLFORD V. HERRINGTON.

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tion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare *Cushing v. Breed*, 14 Allen, 370; *Warren v. Milkken*, 57 Maine, 97; *Dale v. Olmstead*, 36 Ill. 150; 2 Kent Com., 12th ed., 90, and cases cited in Mr. Holmes' note.

## SUPREME COURT OF PENNSYLVANIA.

WOLFORD V. HERRINGTON.

*Trust ex maleficio.*

[Pittsburgh Legal Journal, Oct. 27, 1873.]

Error to Common Pleas of Crawford County.

SHARSWOOD, J.—Upon this writ of error we have nothing to do with the competency of the witness, Mrs. Wolford. Her testimony was admitted, and forms part of the evidence. Had it been rejected, *non constat* that the defendant would not have strengthened his case by other testimony, he might have proved *alivende* that she had a deed for the property, or he might have produced and offered the deed itself. He had a perfect right, when the evidence was in, to rely upon it. Her testimony alone, if believed by the jury—and there was no contradiction of it—showed a clear case of fraud on the part of Herrington within our late decisions of *Beagle v. Wentz*, 5 P. F. Smith, 369, and *Boynlon v. Housler*, 21 Pittsburgh Legal Journal, 17. She had a claim to the land in her own right by an unrecorded deed—whether good or bad—conveying a good title or not, is unimportant; and these cases settle that where one having any interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*.

But we are of opinion, also, that if the testimony of John Wightman—a clearly competent witness, admitted without objection—is believed, it was sufficient to make Herrington a trustee *ex maleficio*, independent of any interest in the land in Mrs. Wolford. He testified that at the time of the verbal contract Herrington distinctly agreed that he would execute a writing declaring the trust before he bid the property

off. At the time of the sale he did not deny but evaded the performance of this promise, by saying he would get his lawyer to write it after the bidding. It was written, and then he refused until the deed was acknowledged. In one of the earliest cases on this subject in Pennsylvania, *Thomson's Lessee v. White*, 1 Dall. 447, decided in 1789, where a husband and wife, having no children, conveyed the estate of the wife to a stranger, who reconveyed to them as joint tenants in fee, under a parol agreement between the husband and wife that the husband should settle the fee upon the wife's heirs, and the husband died without making the settlement, it was held that the parol evidence was admissible to establish the agreement. Mr. Chief Justice McKean said: "Where a party is drawn in by assurances and promises to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced to writing, although this should not be done, the court, if the agreement is executed in part, will give relief." When this case was cited before the same eminent judge soon after, in *Plankinham v. Carr*, 1 Yeates, 370, he said: "The case of *Thomson v. White* was that of a fraud and an exception to the general rule." So it has been classed in the numerous subsequent cases in which it has been cited with approbation in the opinions of this court. *Wallace v. Baker*, 1 Binn. 616; *Drum v. Lessee of Simpson*, 6 Binn. 482; *Cozens v. Stephenson*, 5 S. & R. 426; *Overton v. Tracy*, 14 S. & R. 326; *Oliver v. Oliver*, 4 Rawle, 144; *Robertson v. Robertson*, 9 Watts, 34; *Pugh v. Good*, 3 W. & S. 58; *Miller v. Pearce*, 6 W. & S. 100; *Morey v. Herrick*, 6 Harris, 128. In short, the principle settled in *Thomson's Lessee v. White*, is a landmark of our law, and is well generalized by Mr. Justice Duncan in *Overton v. Tracy*, *supra*: "If one of the contracting parties insists on a certain stipulation and desires it to be made a part of the written agreement, and the other by his promise to conform to it, as if it was inserted in the written agreement, prevents its insertion, this is a fraud, and chancery will enforce the agreement as if the stipulation had been inserted. Having no court of chancery, our common law courts have constantly acted upon this principle from *Thomson v. White*, 1 Dall. 424, to *Christ v. Disfenbach*, 1 S. & R. 464, in a succession of decisions, varying in their circumstances, but all bottomed upon this principle." The case before us is much stronger than *Thomson v. White*, for there was no evidence to show then that wher

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WOLFORD V. HERRINGTON—CHANCERY SPRING CIRCUITS.

the party made the promise he did not mean to comply with it in good faith, but circumstances evinced the contrary. The fact was that he had procured a settlement to be drawn by a conveyancer, which his wife refused to sign, because it contained a remainder to the "issue of the bodies of her three half sisters," one of whom was unmarried, which she thought an indelicate expression; and on his death bed he expressed great uneasiness at not having made a will, and soon after the declaration lost his reason. In noticing the case in *Oliver v. Oliver*, *supra*, Mr. Justice Rogers said: "It has never been doubted that he entered into the contract in good faith." In the case before us, from Herrington's evasion of his promise at and after the bidding, and his final refusal, there was reason to infer that when he made the agreement he did not mean to perform it, and that the whole arrangement was sought by him for the very purpose of deceiving and defrauding the Wolfords, and becoming the owner of their property at a price below its true value. When, however, it is a part of the agreement that the trust shall be declared in writing, or it is shown that the trust was not inserted in the deed under a stipulation to that effect in consequence of the verbal promise to perform it, such fraudulent intent at the time of the agreement need not be shown in order to establish the trust. The fraud consists in the fraudulent use of the instrument, as was decided in *Oliver v. Oliver*. It is true that it has been since held in *Jackman v. Ringland*, 4 W. & S. 149, that where there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee; which was affirmed in *Barnet v. Dougherty*, 8 Casey, 371, *Kellman v. Smith*, 9, Ibid, 158, in the latter of which Mr. Justice Strong said: "The fraud which will convert the purchaser at a sheriff's sale into a trustee, *ex maleficio* of the debtor, must have been fraud at the time of the sale." But in none of these cases did the element exist of a promise at the time to execute a declaration of trust in writing, upon the faith of which the purchase was made. In *Jackman v. Ringland* the opinion was by Mr. Justice Rogers, who does even refer to his own opinion in *Oliver v. Oliver*, and evidently did not suppose that there was any conflict. In *Kellman v. Smith*, Mr. Justice Strong cites *Robertson v. Robertson*, 9 Watts, 32, in the opinion in which, by Mr. Justice Rogers, *Thomson's Lessee v. White* is cited with approbation as a case of fraud. He would undoubtedly have noticed it if he had supposed the

opinion he was then pronouncing overruled it. *Thomson's Lessee v. White*, and *Oliver v. Oliver*, have never been shaken or overruled. These decisions are founded upon sound reason. Where it appears that the understanding at the time of the verbal promise was by a writing to comply with the provisions of the statute of frauds, it is something more than a mere verbal promise. The opposite party relies upon the special stipulation to reduce it to writing and thus make him secure. A chancellor would decree its specific performance. If in confidence that such writing will be executed the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised, and claim to hold discharged of it, which will constitute him a trustee *ex maleficio*. We are of opinion that the case below should have been submitted to the jury. Some difficulty may arise perhaps upon another trial, growing out of the fact that John Wolford, the defendant below, was the defendant in the execution. It may be well for the counsel to consider the propriety of applying to the court to permit Mrs. Wolford also to be made a defendant.

Judgment reversed, and *venire facias de novo* awarded.

AGNEW and WILLIAMS, JJ., dissent.

#### CHANCERY SPRING CIRCUITS, 1874.

##### THE HON. THE CHANCELLOR.

TORONTO . . . Tuesday . . . . . March 24th.

##### THE HON. THE CHANCELLOR.

###### EASTERN CIRCUIT.

|                  |                    |            |
|------------------|--------------------|------------|
| LINDSAY . . .    | Tuesday . . . . .  | April 7th. |
| PETERBORO' . . . | Friday . . . . .   | " 10th.    |
| BELLEVILLE . . . | Thursday . . . . . | " 16th.    |
| BROCKVILLE . . . | " . . . . .        | " 23rd.    |
| CORNWALL . . .   | Tuesday . . . . .  | " 28th.    |
| COBOURG . . .    | " . . . . .        | May 5th.   |
| KINGSTON . . .   | " . . . . .        | " 12th.    |
| OTTAWA . . .     | " . . . . .        | " 19th.    |

##### THE HON. VICE-CHANCELLOR STRONG.

###### WESTERN CIRCUIT.

|                 |                     |             |
|-----------------|---------------------|-------------|
| LONDON . . .    | Wednesday . . . . . | March 18th. |
| WOODSTOCK . . . | " . . . . .         | " 25th.     |
| STRATFORD . . . | " . . . . .         | April 1st.  |
| GODERICH . . .  | " . . . . .         | " 8th.      |
| WALKERTON . . . | " . . . . .         | " 15th.     |
| SANDWICH . . .  | " . . . . .         | " 22nd.     |
| SARNIA . . .    | " . . . . .         | " 29th.     |
| CHATHAM . . .   | Tuesday . . . . .   | May 6th.    |

##### THE HON. VICE-CHANCELLOR BLAKE.

###### HOME CIRCUIT.

|                      |                    |            |
|----------------------|--------------------|------------|
| QUELPH . . .         | Tuesday . . . . .  | April 7th. |
| SIMCOE . . .         | " . . . . .        | " 14th.    |
| WHITBY . . .         | " . . . . .        | " 21st.    |
| BRANTFORD . . .      | " . . . . .        | " 28th.    |
| BARRIE . . .         | Monday . . . . .   | May 11th.  |
| OWEN SOUND . . .     | Tuesday . . . . .  | " 19th.    |
| ST. CATHARINES . . . | " . . . . .        | " 26th.    |
| HAMILTON . . .       | Thursday . . . . . | " 28th.    |

## LAW SOCIETY—MICHAELMAS TERM, 1873.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, HILARY TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

- No. 1276. ROBERT HAMILTON DENNISTOWN.  
 " 1277. JOHN HENRY METCALF.  
 " 1278. J. HOWATT BELL.  
 " 1279. WILLIAM DRUMMOND HOGG.  
 " 1280. KENNETH MCLEAN.  
 " 1281. EDWARD MEEK.  
 " 1282. EDWARD HARRY D. HALL.  
 " 1283. WILLIAM McDONNELL, JR.  
 " 1284. E. BURRITT EDWARDS.  
 " 1285. A. ELSWOOD RICHARDS.  
 " 1286. HENRY ARTHUR REESOR.

The above named gentlemen were called in the order in which they entered the Society as Students, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

- WILLIAM DRUMMOND HOGG.  
 HENRY ARTHUR REESOR.  
 WILLIAM G. MURDOCH.  
 J. HOWATT BELL.  
 E. BURRITT EDWARDS.  
 WILLIAM McDONNELL, JR.  
 ALBERT EDWARD RICHARDS.  
 FRANK D. MOORE.  
 EDWARD MEEK.  
 ARCHIBALD MCKINNON.  
 GEORGE M. ROGER.  
 MORTIMER A. BALL.  
 JOHN MACGREGOR.

And on Tuesday, the 3rd February, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

**Graduates.**

- EDWARD POOLE.  
 ANGUS MARTIUS PETERSON.  
 WILLIAM MACBETH SUTHERLAND.  
 COLIN GEORGE SNIDER (as an Articled Clerk.)  
 LAFAYETTE ALEXANDER MCPHERSON.  
 HENRY PETER MILLIGAN.  
 FRANK NICHOLLS KENNIN.

**Junior Class.**

- WILLIAM BRAIRSTO.  
 WILLIAM LEIGH WALSH.  
 DAVID BURKE SIMPSON.  
 CHESTER GLASS.  
 THOMAS P. GALT.  
 WILLIAM H. BEST.  
 ALEXANDER H. LEITH.  
 FREDERICK CASE.  
 JOHN KELLEY DOWSLEY.

**Ordered,** That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic: Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
*Treasurer.*

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR MAY.

1. Fri... Vienna Expos. opened, 1873. Local Clks. make ret. to Co. Treas. under 32 V. c. 36, s. 113. Assessors in cit. & towns to complete rolls by this date (do. s. 49). Co. Treas. to make up arrs. on lands.
2. Sat... Canda. for Atty. leave art. with Sec. Law Soc. (25 V. c. 2, s. 5.)
3. SUN... 4th Sunday after Easter.
5. Tue... Primary Exam. of Students-at-Law and Art. Clerks.
6. Wed. Siege of Quebec raised, 1776.
8. Fri... John Stuart Mill died, 1873.
10. SUN... Rogation Sunday; 5th Sunday after Easter. Treaty of Peace between France and Germany, 1871.
11. Mon... Law School Examination.
12. Tue... Gen. Sess. and Co. Ct. York begin. Inter. Exams. Cand. for call to pay fees and leave papers.
14. Thu... Ascension Day. Last day for serv. for Co. Ct. Atty.'s.
15. Fri... Examinations for call to the Bar.
16. Sat... Examinations for call with honours.
17. SUN... 1st Sunday after Ascension.
18. Mon... Easter Term begins.
20. Wed... Sir George E. Cartier died, 1873.
22. Fri... Paper Day, Q.B. New Trial Day, C.P.
23. Sat... New Trial Day, Q.B. Paper Day, C.P.
24. SUN... Whit Sunday. McMahon appointed Pres. French Republic, 1873.
25. Mon... P.D., Q.B. N.T., C.P. Last d. to dec. for Co. Ct.
26. Tue... New Trial Day, Q.B. Paper Day, C.P.
27. Wed... Paper Day, Q.B. New Trial Day, C.P.
28. Thu... Open Day, Q.B. Paper Day, C.P.
29. Fri... Last day for not. of trial in Sup. Ct. case for Co. Ct. New Trial Day, Q.B. Open Day, C.P.
30. Sat... Open Day, Q.B. Open Day, C.P.
31. SUN... Trinity Sunday.

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## THE

## Canada Law Journal.

Toronto, May, 1874.

We observe that the Great Seal of Ireland is said to be held in reversion for Dr. Ball, the present Attorney-General for Ireland, till the end of the Session. Meanwhile it has been placed in commission in the hands of Sir Joseph Napier, Mr. Justice Lawson, and Master Brooke, one of the Irish Masters in Chancery.

The Legislature of the State of Illinois has recently amended its criminal code, by allowing prisoners to testify on their own behalf. There are conflicting opinions upon the wisdom of this provision. There were such touching the propriety of examining parties to a civil suit as witnesses on their own behalf. Experience will be the best guide in this, as in other matters. We can afford to wait for the present.

We publish in another column the judgment of Mr. Justice Grove in the Taunton Election Case, which has excited so much comment, adverse as well as favourable, in England. It will, no doubt, be eagerly appealed to in many of the election petitions now pending here. It deals with the question of agency, and defines the limits within which the candidate is responsible for the acts of his supporters.

It has been decided in the Liverpool County Court in regard to commercial travellers, or, as they used to be called in England, "bagmen," or as they are now called in the United States, much more graphically, "drummers,"—that the samples and accounts of such persons are not personal or ordinary luggage, so as to make a railway company liable for their

## EDITORIAL ITEMS.

detention: *Bayley v. Lancashire Railway*, 18 Sol. J. 301.

A very sensible letter from "A Lawyer" is published in one of our English exchanges, upon "the lessons of the Tichborne Trial." He suggests the following important questions which the trial will probably bring on for Parliamentary discussion: (1). The shortening of the period of limitation. (2). The payment of jurors. (3). The pressing of witnesses with questions alleged to go to their credit. (4). Contempt of Court. (5). The shortening of the speeches of counsel, and, (6). The calling of material witnesses, called by neither party, by the Court itself.

Much solemn merriment appears to be occasioned in English legal circles by the fact that Lord Westbury's will is so difficult of construction, that it will consume no small portion of his assets in getting it into a workable shape. Already for the third time the Master of the Rolls has been invoked to construe a passage of this intricate production. He said that never had he seen a document more difficult to construe, and gladly would he have declined the task on the ground that it could not be construed. But upon the decisions of Lord Westbury himself, he was precluded from taking that course.

We publish in another place the report of a case decided in the Province of Quebec, to which we direct the attention of our readers, as to the jurisdiction of the local legislatures to impose fines and imprisonment conjointly for the same offence. The opinion of Mr. Justice Sanborn, in this case, is in conflict with the judgment of Drummond, J., and Torrance, J., in *Ex p. Papin*. The report of this last case in Chambers will be found in

8 C. L. J. 122. It is also reported in 16 C. L. Jurist 319. The question on the construction of this sub-section of the British North America Act has not arisen directly in this Province. The matter was referred to incidentally in *Reg. v. Boardman*, 30 U. C. Q. B., 555, and, from the language of the Chief Justice, it is to be inferred that he would agree with Mr. Justice Sanborn's reading of the Act. Richards, C. J., there refers to the difficulty of construing the Act in the rigidly technical manner that counsel pressed them to do in the argument.

There are counsel who will never give the Judge on the Bench credit for knowing anything. They go into the discussion of all questions exhaustively. Such an one was the eminent conveyancer, Mr. Preston. When called upon on one occasion to argue some question of real property law before the Common Law Court, he made his exordium by laying down the proposition that "an estate in fee simple was the largest estate known to the English law." "Stop a moment," said Lord Ellenborough, "till I take that down." And so while feigning with well-simulated earnestness to take down the observation of the counsel, the learned Judge was in truth taking down the counsel himself. An occurrence somewhat the converse of this happened while Lord Coleridge was presiding at the last Berkshire assizes. In an action of ejectment, his Lordship asked Mr. Bosanquet, one of the counsel, if he would kindly supply the defects of an Oxford education by informing him what measurement was represented by a perch mentioned in one of the leases produced in the course of the trial. Whereupon, amid some laughter, the learned counsel explained that a perch was not the same in all counties, but usually it was understood to mean sixteen feet.

## EDITORIAL ITEMS.

At the York Assizes there are generally two or three slander cases on the docket. That such cases should become common, must cause regret to all right-thinking persons, and it is still more lamentable when the cause of action has arisen from some apparently trifling cause between persons who once loved each other as friends. It has seldom been our duty to notice a more painful case of this nature than that of *Tilly v. Brookman*, tried at the late Assizes here. It seems that Tilly and Brookman are neighbours, and once dwelt together in harmony. But on an evil day, Brookman became the owner of a turkey, a wrong-headed bird, which persisted in trespassing wilfully and without lawful excuse, upon the close of Tilly. One day this turkey, grown bold in defiance of the law, proceeded as usual upon his lawless excursion, and—never returned. Thereupon Mr. Brookman, sorrowing for the loss of his turkey, and suspecting foul play, took occasion to accost Mr. Tilly, in the backyard of the latter and in the presence of several ladies and gentlemen, with the pointed inquiry, "Who stole the turkey?" Mr. Brookman, becoming unduly heated, went on to insinuate that if Mr. Whicher, of the Isle of Wight, happened to be on this continent, he could mention facts connecting Mr. Tilly with some purloined candles in an unfavourable light. Clearly Mr. Tilly, not caring to make a breach of the peace, had but one course open to him. With just anger in his heart, and \$50 in his hand, he sought legal advice. He was so fortunate as to find a counsel who fully appreciated the outrage, and having laid his wrongs and the said \$50 before him, he bade him vindicate his character. Will it be believed that an unsympathizing jury, acting under the direction of a heartless Judge, assessed the damage to Mr. Tilly's character and feelings at *one shilling*, not even enough,

as they were touchingly reminded, to get him back his \$50 retaining fee! Nay, the same Judge frankly stated that he had not met with a more trivial action within the last thirty years!

Our clever contemporary, the *Albany Law Journal*, to which we are indebted for many entertaining articles, hardly discusses English legal affairs in the spirit of Judicial fairness. The Persian King who wanted to keep up his animosity against an offending nation, had a slave to say to him as he sat down to dinner, every day, "Sire, remember the Athenians." We could almost fancy a devil, or other satellite, performing similar functions for the American Editor, if he needs such assistance, to remind him that as a loyal Yankee he owes a grudge to everything English. We think the spitefulness we allude to is manifest in the comments of that journal on the Tichborne case. For instance, we find it suggested that, in this case, the judgment of the Judges, as well as the people, has, owing to the invincible aristocratic instincts of both, been dangerously biased against the Claimant. Dr. Kenealy comes in for a share of sympathy, too. "The English press," we are told, "after having seen the degradation and transportation of the Claimant, are now venting their wrath upon Dr. Kenealy." "Every man accused of crime or imposition" is in danger of being "deprived of proper legal assistance." "Let us hope that the case of the Claimant is an exception, and not the rule: and that no lawyer need be condemned for *honestly and faithfully* defending one who proves to be guilty of the offence charged." If Dr. Kenealy had confined himself to "honestly and faithfully" defending his client, he would have gained the approbation of more classes than the very lowest classes, with whom the Claimant is a special favourite. As he

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chose to abandon the just line of defence, for that of unscrupulous attack upon all who had any, and many who had no connection with the prosecution, his conduct has been animadverted upon, but in no intemperate terms, by the press, to whom the character of the English Bar is very dear. Had any enterprising scoundrel been on his trial in the United States for a fraud of similar magnitude, and been defended in a similarly reckless style, we make no doubt he and his counsel would have held a much more honourable place in public opinion than Orton and Dr. Kenealy do in England.

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The Statute-Book of Ontario for 1874 promises to be varied in character and voluminous in contents. It will bulk nearly as large as the volume for the previous year, and in measures of importance the legislation is in many respects deserving of commendation. The consolidation of the School Law is as great a boon to the profession and the public as the consolidation of the Municipal Law, and the Administration of Justice Act of 1873 has its fellow in the Administration of Justice Act of 1874. Most of the Statutes of consequence are already printed in supplements of the *Ontario Gazette*, and we propose in the present paper to call attention to some changes in the law effected by these Acts.

The Act respecting Escheats and Forfeitures does away with the ancient but needless ceremony of an inquisition being formally held in cases where property escheats to the Crown. Objection has been taken to the clause in the Act providing that the Lieutenant-Governor in Council may assign any portion of the escheated personal property to any one having a legal or moral claim upon the person to whom the same had belonged. But this is in truth only expressing what

was customarily done with the property when the Crown, after escheat, of its own motion disposed of it for the benefit of the relatives or connections of the original owner. If we mistake not there is a provision to the like effect in the Scotch law. The Act may perhaps be more open to question on Constitutional grounds, as between the Province and the Dominion.

The next Act printed in the *Gazette* is that of Mr. Bethune for the apportionment of rent between the landlord and tenant. The principle of the Act is to assimilate all periodical payments in the nature of income, so that, as in the case of interest, they shall be deemed in law to accrue *de die in diem*. It is an extension of the principle of apportionment already recognised in the law of Ontario, to a limited extent, in the case of rent pure and simple, by the adoption of the Statute of 11 Geo. II., c. 19, and is almost a transcript from the Imperial Statute 33 and 34 Vict. c. 35. Upon the construction of the English Act it may be useful to refer to the cases of *Capron v. Capron*, 22 W. R., 347; *Jones v. Oyle*, L. R., 8 Ch. 192, and *Clive v. Clive*, L. R. 7 Ch. 433.

So far as we have been able to examine the Act respecting the incorporation of Joint Stock Companies, it seems to make a very considerable advance in point of comprehensiveness and completeness over any of its numerous predecessors. It is necessary, in view of the vast development of corporate enterprise in the way of mining and manufactures, to have the law more efficient and satisfactory in regard to the formation and winding up of Joint Stock Companies, and the Act in question seems to go a long way in the right direction.

One great evil of local legislation hitherto has been the facilities which it offered and afforded to the passage of private Acts. One considerable check has been

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given to much unsatisfactory legislation by the Act of a former session, which required the submission of a certain class of bills for the approval of the judges, and the practice adopted by the Government of opposing all bills upon which the judges have reported unfavorably. We perceive another check to this pocket-legislation in the Act respecting Benevolent, Provident and other societies. It is not our business to deal with politics, nor to discuss the circumstances with regard to the Orange incorporation bills, out of which the comprehensive Statute in question grew; all we have to say is, that the outcome of the contention, as manifested in this Act, will effect good results in lessening private legislation.

It will be a source of great relief to the County Judges, who came to such contradictory conclusions as to the assessment of Bank Stock, to find that the law has now been made plain by the interposition of a parliamentary *Deus ex machina*. The Act to amend the Assessment Law will bring tranquility to many anxious stockholders, but as for ourselves—

“The empty traveller may whistle,  
Before the robber and his pistol.”

We have no space to comment upon the Act which consolidates the Liquor Laws, beyond an expression of satisfaction that the law has been again brought into manageable shape and the confusion of manifold Statutes reduced to order.

The next great Act of the session is that relating to the Administration of Justice, which it would be out of the question to attempt to deal with now at any length. We have, however, noticed most pertinacious objections, made both on the floor of the House, and afterwards by newspaper critics, with regard to the constitution of the Court of Appeal. It is said, for instance, that as the Court consists of four judges, when the Court is equally divided the judgment appealed against will stand. This, it is observed,

will lead to curious results, and one is instanced thus:—it sometimes happens that on hearing a question more ably argued, the judge whose decision is questioned sees reason to change his opinion and to reverse his former judgment. In such an event, the writer we have in view says: “when the Court of Appeal is equally divided, the anomalous result will be that two judges will prevail against three.” But the difficulty suggested can never occur. It is provided that causes heard before a single judge are to be re-heard before the full bench of three, before the case goes to appeal. When in appeal it will be disposed of by four independent judges, who have not sat on the case before. If there is a dissentient judge in the Court below, with his two brethren against him, and the judges in appeal are equally divided, then the decision below will be affirmed, as it should, because then there would really be the opinion of four judges against three, and the views of the majority should prevail. It is better, in our view, instead of an odd to have an even number of appellate judges, as is the case with the Lords Justices in England. We think, however, that in some other respects the constitution of the court is objectionable, and that a more simple and more effective scheme might have been devised for giving us what the country really wants, namely, a strong and independent Court of Appeal. The judges of this court should only have their appellate work to do, but should have in that respect more thrown upon them than is now done by the present court, and thereby relieve the judges of the three lower courts, whilst still having themselves plenty of time to devote to their important duties as the court of highest resort in this Province.

The Act with respect to compensation to trustees is a consequence and a legislative over-ruling of the decision in *Deedes v. Graham*, 20 Gr. 258, which was upheld



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in appeal. The Act respecting the Solemnization of Marriage leaves untouched the important question raised in *Cullen v. Cullen* as to the right of Roman Catholic Bishops to dispense with banns and license, but otherwise legalizes marriages irregularly solemnized. There are other Acts of no small consequence with relation to the Rights of Innkeepers, the Garnishment of Workmen's wages, the Election Franchise, the Establishment of Industrial Schools, and the amendments of the Municipal Law, *cum multis aliis*, among which is that tremendous triumph of parliamentary pertinacity, "the Act respecting Line-fences," which we can only thus briefly refer to.

It is unquestionable that the student of the laws, be he apprentice, doctor or judge, must diligently bestir himself to keep pace with the march of legislation. Coke's explanation of the growth of the laws no longer meets the case—

"Queritur ut crescent tot magna volumina legis,

In promptu causa est, crescit in orbe dolus."

Not so much craft as craftsmen, not so much cunning in its modern and degenerated meaning, as cunning in its original and highest sense; not so much scheming as manifold schemes for the advancement of commerce and the development of the country: these are some of the causes of this abundant legislation, and it rests upon the diligence of the bar and upon the uprightness of the judge to lessen as much as may be the evils of crude legislation and to foster as far as possible all that will advance the best interests of the province.

## JUSTICE SILENCE.

"Good Master Silence, it well befits you should be of the Peace."—*King Henry IV., Part 2.*

When we were speaking lately of Justice Shallow, we touched upon the manners and customs of those excellent

young men the students of Clement's Inn. A good many years ago our own Osgoode Hall resembled, in some respects, the Inn where "lusty Shallow" once dwelt. A portion of it was occupied by students, who probably cheered the tedium of their studies with an occasional frolic. We fancy there are grave and grey-headed men at the bar, or on the bench, who looking back to the time when they lived as students at "The Hall," might exclaim with Shallow, "Oh, the mad days that I have spent!" Our country Justices, however, do not as a rule enjoy this pleasing retrospect. Their early years are devoted to the plough and axe more often than to books of law, or books of any other description.

In the plays of Shakespere, from which we have quoted, we find instructive passages in the private life of the Elizabethan Justice, but unfortunately we see nothing of him in his judicial capacity. This is matter for regret, since a Shakesperian picture of a weak, irritable and ignorant magistrate, dispensing equity according to his arbitrary notions of that science, would have been full of warning and instruction. But Justice Shallow does not become more profound, more dignified, or more impartial as the world grows older, and we find him depicted by the satirist in modern life, in much the same colours as he might have been painted in the days of Elizabeth. Every Justice may with profit reflect upon the humiliating figure made by the famous Nupkins, as recorded in that truthful record of human follies, the *Pickwick Papers*. We all remember Nupkins, into whose awful presence the unfortunate *Pickwickians* are dragged by the minions of the law on some fanciful charge. Nor do we forget the mild and useful Jinks clerk to that dignitary, who had served three years in an Attorney's office, and upon whose slender knowledge of the law the magistrate relies to get him through his

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duties with moderate decency. Nupkins, having heard the highly-coloured statement of his satellite Grummer, is convinced that the prisoners are dangerous criminals, and with a noble appreciation of the rights of the accused Briton, proceeds to sentence them unheard. Then Mr. Pickwick, with indignant fervour, asserts the inalienable privilege of a British subject.

"First," said Mr. Pickwick, sending a look through his spectacles, under which even Nupkins quailed, "first I want to know what I and my friend have been brought here for?"

"Must I tell him?" whispered the magistrate to Jinks.

"I think you had better, Sir," whispered Jinks to the magistrate.

"An information has been sworn before me," said the magistrate, "that it is apprehended you are going to fight a duel, and that the other man, Tupman, is your aider and abettor in it. Therefore ————eh, Mr. Jinks?"

"Certainly, Sir."

"Therefore, I call upon you both to ———— I think that's the course, Mr. Jinks?"

"Certainly, Sir."

"To ————to ————what, Mr. Jinks?" said the magistrate, pettishly.

"To find bail, Sir."

"Yea. Therefore, I call upon you both—as I was about to say when I was interrupted by my clerk—to find bail."

"Good bail," whispered Mr. Jinks.

"I shall require good bail," said the magistrate.

"Fifty pounds each," whispered Jinks, "and householders, of course."

"I shall require two sureties of fifty pounds each," said the magistrate aloud, with great dignity, "and they must be householders, of course."

We hope that magistrates of the Nupkins stamp are not common. When they do exist, by their rashness, tyranny and complacent ignorance, they bring the sacred name of justice into contempt, and justify such sarcasms as Mr. Samuel Weller's: "This is a wery impartial country for justice. There ain't a magistrate going as don't commit himself twice as often as he commits other people."

It is with feelings of satisfaction that we turn from the rash and foolish Shal-

low to the discreet Silence. Justice Silence may have no more legal acumen and knowledge than his neighbour Shallow, but he has a fund of sense and discretion, which has earned for him the reputation of being an eminently respectable magistrate. Justice Silence reasons that a judge should keep two objects steadily in view. First, to decide rightly: second, to make the public think he decides rightly. It is not to be expected that a Justice of the Peace will always attain the first object. It is a pure matter of chance whether he will determine rightly or not, and after all the chances are equal. But the second object it is most important and more easy to effect. If the majesty of the law is to be duly recognized and revered, magistrates must take care to impress the public with a belief in the impartiality and correctness of their decrees. In this respect Justice Silence succeeds admirably, and may therefore be taken as the type of an excellent justice. His very appearance is calculated to inspire confidence in his administration of the law. His visage is solemn, his form portly, and his manner deliberate. In a word, he is gifted in a very considerable degree with what is known as judicial dignity. The cynic may say that what we call dignity, is simply the stolidness which belongs to mental vacuity; but after all, dignity, as some one has defined it, is nothing but a mysterious carriage of the body designed to conceal defects of the mind. We therefore claim that Justice Silence has that first attribute of the judicial office—dignity. As his name implies, Justice Silence is not given to over-much talking. A man of few words always passes for a wise man, and the acute public are wont to argue that if the magistrate does not waste many words, he "does a powerful sight of thinking." Justice Silence listens with never-failing patience to everything that everybody

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wants to say, and we all know that this is one of the most beautiful characteristics of the perfect judge. Before him the youthful limb of the law may lay down the most novel doctrine without fear of contradiction, and may indulge to his heart's content that fondness for thoroughness and "first principles" which distinguishes youthful limbs, as in the case of the one who in moving for a "Final Order" began with a sketch of the jurisdiction of the Court of Chancery. Silence never descends to undignified contention with counsel, nor does he take a malignant pleasure in spoiling their neatest propositions with untimely and embarrassing queries. In truth he feels no overweening confidence in his own legal abilities, and discreetly forbears to meddle with points of law. In this he presents a striking contrast to Justice Shallow, who is always rushing recklessly into argument, only to lose himself in a maze of reasoning, and to expose himself to scorn and derision. It is thus that Shallow is betrayed into such startling dicta as that the Statutes of Limitation are not in force in this province, or that a man who swears on a Roman Catholic Bible is legally disqualified from speaking the truth. Again, while Shallow's passion for talking and the sense of his importance lead him to aggravate the punishment he is about to inflict upon offenders, by scourging them freely with his tongue, Silence adds no such unkindness. He acts upon counsel such as the good Don Quixote gave to Sancho Panza, when about to assume the government of his island: "Him you are to punish with deeds, do not evil-entreat with words; for the pain of the punishment is enough for the poor wretch to bear, without the addition of ill language." By such a course does Silence conduce to his reputation, for the public who frequent the magistrate's court love fair play, and take a respectful interest in criminals. The thoughtless complain

that Justice Silence is aggravatingly slow in making up his mind; but so was Lord Eldon, who was a respectable judge, and slowness is necessary to caution. But if he is slow in coming to a decision, having decided, he is immovable. When the dread sentence, couched in the fewest possible words, has passed his lips, no law of the Medes and Persians was ever more irrevocable. The decision, delivered with the firmness of conviction and after patient hearing, satisfies the public mind, and is never weakened by the indiscretion, on the Justice's part, of explaining the reasons on which it is based.

A general officer in the army, a friend of Lord Mansfield's, once came to that great man saying that he had just been appointed Governor of one of the West India Islands. This, he said, made him very happy till he found he was not only to be Commander-in-Chief, for which he thought himself not unfit, but that he was also required to sit as Chancellor and decide cases, whereas he was utterly ignorant of law, and had never been in a court of justice in his life. How he was to perform his judicial duties with decent success he was troubled to think. "Be of good cheer," said Lord Mansfield; "take my advice, and you will be reckoned a great judge as well as a great commander. Nothing is more easy. Only hear both sides patiently: then consider what you think justice requires, and decide accordingly. • But—*never give your reasons*—for your judgment will probably be right, but your reasons will certainly be wrong." Here, then, we have the great secret of magisterial success—"never give reasons." It is by pursuing a course like that suggested by Lord Mansfield to his friend, that Justice Silence has gained a well-merited fame. The Justice who hopes for a similar reputation, must conform himself to the model of this respectable man: must emulate his patience, his gravity, and his reticence. By steadily

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persevering in such a course he may expect the approbation of an admiring world, and that to him also shall be applied the gratifying encomium, "Good Master Silence, it well befits you should be of the Peace."

## ELECTION PETITIONS.

All the light that can be thrown upon Election Law will be acceptable at the present time. We understand that Mr. Thomas Hodgins, Q.C., has prepared a treatise on the subject, which will very shortly be published, and will doubtless give us much assistance on points arising under the rather peculiar and incomplete state of the Statutes that regulate the law and procedure. Mr. Brough's book refers especially to the Ontario Election Law, but may be consulted with much advantage. The general question of Agency is one of the greatest difficulty. The *Law Times*, in a recent number, reviews the second edition of Leigh and Le Marchant's work on elections, and extracts from that and from a treatise by Mr. F. O. Crump, in Cox and O'Grady's Election Law, some passages on the question of Agency. In the former work it is stated:—

An agent is a person authorized by the candidate to act on his behalf in affairs connected with the election, and the candidate, as regards his seat, is as liable for acts committed by his agent as if he himself had been personally concerned therein; although the agent may not only have exceeded the authority committed to him, but have acted in opposition to the express commands of the candidate. So extreme, in fact, is the liability of the candidate for his agent, that the relation between them is not analogous to that existing at common law between principal and agent.

The candidate is answerable for the acts of his agent in the same way as a master is answerable for the acts of his servant done in the course of his employment, whether lawful or not, notwithstanding a prohibition may have been given to him by his master.

A candidate has been held answerable for acts committed by a person employed in a subordinate capacity by the agent for the purposes of

the election on his own responsibility to the same extent as if those acts had been committed by the superior agent himself.

Besides the agent for election expenses, there are other paid persons whose names would appear in the detailed statement of election expenses under 26 & 27 Vict. c. 29, s. 4.

The mere fact of their names appearing in that statement as paid by the candidate for the purposes of the election would probably be held as sufficient evidence of their agency, unless they were merely employed and paid in some subordinate capacity such as that of a messenger or bill-sticker, &c. The candidate may be bound also by acts committed in the course of the election by other persons on his behalf, though not named in the election accounts and unpaid.

A man's wife, if she interfere in the election, is *ipso facto* his agent.

Any act, however trifling, is evidence of agency, and an aggregate of isolated acts will by their cumulative force constitute agency; though no one of them alone, if severed from the others, might be conclusive.

*Exempli gratia:—*

1. Being a member of the committee.
2. Canvassing alone, and with or without a canvassing-book.
3. Canvassing in company with the candidate.
4. Attending meetings and speaking on behalf of the candidate.
5. Bringing up voters to the poll.

From the latter work is extracted the following:—

The words used in the Corrupt Practices Act to denote acts which are to affect a member's return are these, "by himself or by any other person on his behalf." In one of the first petitions tried before a Judge (the *Norwich Petition*, 19 L. T. Rep. N. S. 615), the effect of these words was considered, and Baron Martin held that they included any person for whom in law the member was responsible, whether he be an agent directly appointed by the member, or whether he be an agent by reason of the construction which has been placed upon the Act of Parliament—a construction which, his Lordship remarked, is to some extent binding on the Judges. The contention of counsel for the respondent in that case was that the respondent could not be held responsible for an act to which he was not privy. This contention was at once disposed of, and without citing further authority—and every petition tried is an authority on this point—it is to be taken that the candidate

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must suffer the consequences of the acts of every person for whom he is legally responsible.

The important question which we have now to consider is what constitutes an agent. And in the first place it should be observed that it was held by Mr. Justice Willes, in the *Windsor Petition*, 19 L. T. Rep. N. S. 613, that mere employment does not constitute agency, and that therefore bribery by a messenger unauthorised to canvass did not affect the election. Payment for services, indeed, is not an element in the matter at all, for it was held by Mr. Justice Blackburn, in the *Bewdley Petition*, 19 L. T. Rep. N. S. 676, that it is not necessary that an agent should be paid in order that his act should affect a member's seat. But agency is not established by the mere fact of a person's name being on the published list of the committee, 20 L. T. Rep. N. S. 24. Mr. Justice Willes there said, however, "If I find a person's name on a committee from the beginning; that he attended meetings of the committee; that he also canvassed, and that his canvass was recognised so far as it went, I must require considerable argument to satisfy me that he was not an agent within the meaning of the Act of Parliament."

So much for negative decisions. Now, as to affirmative, we have the high authority of Mr. Justice Willes for saying that no distinction is to be drawn, as regards agency, in cases of bribery, treating, and undue influence: 23 L. T. Rep. N. S. 990. His Lordship was at first disposed to exclude treating from the acts done by an agent which should avoid the election, but his conclusion was that the 36th section of the Act must be read literally. Therefore all the corrupt practices stand upon the same footing as regards agency. In the *Norwich Petition* (*sup.*) we have the strongest evidence of agency, for there the learned Judge held that the agency of a particular individual had been proved "up to the hilt." Three persons stated him to be a canvasser. It was proved that he canvassed in the company of the son of the sitting member, and that on the afternoon of the day of polling he went to a public-house and bought votes. Further, as to canvassing, Mr. Justice Willes, in the *Guildford Petition*, 19 L. T. Rep. N. S. 729, said (p. 732) "as a rule agency to bind the member would be agency to canvass or to procure votes on his behalf."

Now arises the question what is authority to canvass?

In the *Windsor Petition* (*sup.*) Mr. Justice Willes said, "an authority for the general management of an election would involve an authority to canvass." And in making that

observation his Lordship remarks that he purposely used the word "authority" and not "employment," because he intended to refer to persons who were not paid for their services. It is quite clear, of course, as remarked by Mr. Justice O'Brien in the *Londonderry Petition* (Printed Judgments, Part II., p. 252), that no mere supporter of a candidate who chooses to ask for votes, and to make speeches in his favour, can force himself upon the candidate as an agent. In the *Westbury Petition*, Mr. Justice Willes said the act done to affect the candidate must be done by his procurement, and held it immaterial whether a desire that a person should canvass be expressed or implied, by words or by actions. And the learned Judge, in that case, gave a definition of canvassing. "Canvassing," he said, "may be either by asking a man to vote for the candidate for whom you are canvassing, or by begging him not to go to the poll, but to remain neutral and not vote for the adversary. No distinction can be drawn, except in the amount of favour, between voting for a man and abstaining from voting for his adversary. That such is the law appears from the 17 & 18 Vict. c. 102, which places on the same footing inducing a man to vote at an election and inducing a man to abstain from voting."

The question What is agency? was much discussed in the *Staleybridge Petition*, 20 L. T. Rep. N. S. at pp. 76, 77, especially with reference to the acts of volunteers. One of the counsel there urged that the responsibility of the candidate should be limited in the case of volunteers,—that the petitioners should be bound to show some authorizing on the part of the candidate to the persons whose acts are sought to be made available against him. In his judgment, Mr. Justice Blackburn considered the arguments addressed to him, and went fully into the matter. And first he noticed a mode of constituting a person an agent, which he had held in the *Bewdley* case to be most effective, that is so as to make the candidate responsible not only for the acts of the person so appointed, but for the acts of those whom that person might employ as his agents. Sir R. Glass put money into the hands of a person at Bewdley, and exercised no supervision as to how it was to be expended, simply giving directions that it should not be expended illegally. The judge came to the conclusion that there was such an agency established as to make the candidate responsible to the fullest extent. The evidence did not go so far as this in the *Staleybridge* case, but the learned Judge held that the mere act of taking the committee rooms by the volunteer committee

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amounted to evidence that the sitting member and his people did request those committees to bring up voters when they could, and consequently that the persons who, joining those volunteer committees, went and fetched voters, were in one sense employed by the sitting member to bring up voters.

In this same case, Mr. Justice Blackburn takes occasion to say that he does not think the principle that a person employed to canvass makes the candidate responsible for his acts, laid down by Mr. Justice Willes in the *Windsor* case, can be accepted as a hard and fast rule. "As a general proposition," he said, "that would go a great way towards saying who is an agent, but I don't think we can take it as an absolute hard and fast rule, on which we can say that wherever a case of corruption has been brought home to a person who was within the limit, the seat should be vacated. The effect of that would be to say that wherever there were volunteers who were acting at all, and whose voluntary acting was not repudiated by the candidate or his agents; wherever, in fact, a person came forward and said, 'I will act for you and endeavour to assist you,' and the candidate or his agent said, 'I am very much obliged to you, sir'; any corrupt or improper acts done by the volunteer, although unconnected with with the member, would render the election void. At present," his Lordship added, "I cannot go further than to say that each case must be considered upon the whole facts taken together, and it must be determined in that way whether the relation between the person guilty of the corrupt practice and the member was such as to make the latter fairly responsible for it." This is equivalent to saying that no general rule can be laid down on the question of authority by implication; but his Lordship said, later on, that in drawing the inference the reason of the rule which makes a candidate responsible for the unauthorised acts of his agents should be borne in mind. It seems to be agreed by all the Judges that in considering the question of agency the nature of the acts done by the alleged agents are most material. In the *Staleybridge* judgment, from which we have been quoting, Mr. Justice Blackburn said that "whenever it appears that the things are numerously done, it would go very far to show that the agents did come within that principle upon which the law is founded, viz: that they were persons, the benefit of whose foul play the member was to get, and therefore it would be right that he should forfeit his seat in consequence." The same learned Judge further considered this question

in the *Hastings Petition*, 21 L. T. Rep. N. S. 234. His Lordship there says: "I have frequently had it in my mind that there is great difficulty, in strict logic, in making the agency of a person dependent upon the extent of the corrupt practices committed by him. It does seem that in strict logic, if a man would be an agent if he was shown to have corrupted one hundred people by paying them £5 a-piece, then if he corrupts only a single man by giving him a single glass of beer, he ought to be regarded as an agent equally. There is no doubt, in strict logical language, you will find a difficulty in making the distinction, yet I cannot but feel that, in administering justice and in administering the law in such a way that it would be tolerable, one must make some distinction of that sort. There is the same thing that constitutes a man an agent in the one case present also in the other case; but I cannot but feel that where the case is a small, isolated, solitary case, it requires much more evidence to satisfy one of agency than would otherwise be necessary. If a small thing is done by the head agent . . . . the agent for the election expenses, I think that would have upset the election; and if small things to a considerable extent were done by a subordinate person, comparatively slight evidence of agency would probably have induced one to find that he was an agent."

This may be taken to be the view adopted by the election Judges; and having disposed of the mode in which an individual agent may be constituted, we will proceed to the question of the agency of associated supporters.

In the *Westminster Petition*, at page 246 of 20 L. T. Rep. N. S., Baron Martin deals with the point, observing that he could not suppose that where an association of persons numbering 600 or 700 members chooses to call itself a committee, therefore they become the agents of a candidate for the purpose of making him responsible for a wrong act or an illegal act done by them. And subsequently he defined a committeeman. "The Committeeman," he said, "whom I mean, and for whom I would hold Mr. Smith responsible, is a committeeman in the ordinary intelligible sense of the word, that is to say, a person in whom faith is put, and for whose acts he is responsible." Nothing more need be said as regards this, we having noticed the subject of the agency of political associations incidentally in discussing the *Wigan* and *Taunton* cases under "Candidate and Agent." Suffice it to say that it must be taken as established that there is no partnership privity between the parties subscribing to a political

## ELECTION PETITIONS—VIAN V. MAYNARD.

association; nor does the fact of subscribing confer any authority upon the person who manages it to make them responsible for an illegal act done by him.

We have now to consider at what point an agent ceases to be an agent, so as to make a candidate responsible for his acts. And, in the first place, it is to be noticed that treachery will deprive an agent of his capacity as such. This was expressly pointed out by Mr. Justice Blackburn in the *Stafford Borough Petition*, 21 L. T. Rep. N. S. 212. He said, referring to the proceedings of one Machin, "If the evidence was to the effect that Machin, though he was then a paid agent of Colonel Meller, was at that time planning to betray Colonel Meller, that it was what is called a plant, then I do not think that Machin could any longer be considered an agent of Colonel Meller, so that his acts would vacate the election. I wish to point out the distinction which I make, that according as the law stands at present, if a member employs an agent, and that agent, contrary to his wish, and contrary to his directions, commit a corrupt act, the sitting member is responsible for it; but when he employs an agent, and the agent treacherously or traitorously agrees with the other side, then if he does a corrupt act it would not vacate the seat, unless it is proved that the corrupt act was at the special request of the member himself or some untainted and unauthorized agent of the member who directed the act to be done." His Lordship was very particular upon the point, for he added: "The distinction is pretty obvious, and I mention it to avoid any difficulty or doubt that there might be hereafter, from its being supposed that I have said anything more than I do say; I say if Machin was a treacherous agent he loses the power of upsetting the seat by reason of his unauthorized acts of corruption; it would require actual proof of authority in order to make it so. It is a very different affair if a man being an agent has been tricked by the other party into committing a corrupt act, he himself honestly still intending to act as an agent."

Express authority will, of course, recreate an agency which has lapsed or been annihilated. As above, it will do away with the effect of treachery; and in the case of corrupt acts done after the election, the agency, having ceased with the close of the election, may be revived by express authority, so as to constitute the person an agent, and thus to affect the return. "The agency at the election," said Mr. Justice Blackburn, in the *Norfolk Petition*, "which was solely for the canvassing before the election, expires with the election. Whether or no a per-

son who had been requested to canvass would be an agent whose misconduct would avoid the election, would depend upon the evidence; but unless there is something to show continuing authority, that person could not, if he had given a feast ten days after the election, by that act upset the election."

Further, and lastly, it is perfectly clear that where there is a coalition between candidates, each becomes the agent of the other. The limit of this agency is shown in the *Norfolk Petition* before referred to. Here we conclude the consideration of the very difficult question of agency. Notwithstanding the diffidence expressed by all the Judges in dealing with it, and their doubts concerning the various attempts which have been made to define it, we do not conceive that there will be much difficulty in dealing with the next batch of petitions by the light of the judgments which we have been examining.

## SELECTIONS.

## LAW OF SEDUCTION.

The case of *Vian v. Maynard*, tried some months ago in the Court of Exchequer before Baron Cleasby, illustrated in a very forcible manner the anomalous condition of the English law on the subject of seduction. In that case there had been a previous trial for breach of promise of marriage brought by the daughter of the plaintiff, but as there was not sufficient evidence of a promise by the defendant the action failed. On this the father, in accordance with suggestions made at the former trial, brought an action for seduction against the defendant. Thus, owing to the rule of law that no action lies against the seducer at the suit of the party immediately interested, but that the only right of action is founded on the loss of the girl's services to her father, reducing the question to a case of master and servant, all the parties in this case were put to the trouble and cost of two trials, when the whole matter might have been very well settled on the first occasion but for the rule in question. If the woman who was seduced, and to whose father the jury awarded damages in the second action, could have brought an action for seduction in her own right, the two causes might have been joined, and all further trouble have been avoided. On what grounds such an anomaly is perpetuated it would be difficult to say,

## DISTURBING RELIGIOUS WORSHIP—JUDICIAL FORESIGHT.

except that it has become venerable by age. It has been commented on over and over again, and nothing but the aversion of the Profession from all changes in what they have become accustomed to could have kept such a rule in force. The rule amounts to this, that the party really injured has suffered no injury sufficient for the law to notice, but that her father, or master, who has lost her services, can bring an action for such secondary and inferior loss. This loss of service may be of the most trifling description. In one case, indeed, tried by Chief Justice Abbott, his Lordship held that the loss by a father of his daughter's services in making tea was a sufficient loss to enable him to maintain this action. But when the loss of service has once been established, then damages are heaped up on other grounds, and this practice had become so inveterate in Lord Ellenborough's time, that he said it could not be shaken. So that the damages given frequently include an appraisalment by the jury of the moral delinquency of the defendant, and the injury and dishonour sustained by the real plaintiff and her family. Is it not time that a rule of law, which places a father's inconvenience in having to make his own tea above the loss of his daughter's virtue, and the dishonour they both suffer, should be abrogated, and the seduction itself be made the ground of action, if any such actions are to be allowed? There are some who think, however, that such actions should not be maintainable, the consent of the woman taking away the right of action. Whichever opinion prevails, it is very desirable that the law should be placed on a reasonable footing, and that juries should not import into their verdicts damages for injuries quite distinct from the ostensible one on which the verdict is founded.—*Law Times*.

### DISTURBING RELIGIOUS WORSHIP—A CURIOUS CASE.

It is not often that a case arises combining the comical with the serious in as peculiar a manner as the case of *The State v. Linkhaw*, 69 North Carolina Reports, 214. The defendant, a member of the Methodist Church, was indicted for disturbing the congregation. It was in proof that he sang, during religious

worship, in such a manner as to disturb the congregation, and greatly interrupt the services. One of the witnesses imitated his singing in a manner which "produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court." It was in evidence that the disturbance occasioned by his singing was decided and serious. "The effect of it was to make one part of the congregation laugh, and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." The defendant, being on many occasions expostulated with by the church-members and authorities, replied, "that he would worship God, and that as a part of his worship it was his duty to sing."

It was not contended by the State that the defendant had any purpose or intention to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services. Nevertheless, the trial court instructed the jury that he must be presumed to have intended the necessary consequences of his bad singing; and they accordingly returned a verdict of guilty. But the supreme court (Settle, J.) said that this admission of the State put an end to the prosecution; that, although a man is generally presumed to intend the consequences of his acts, yet the presumption is here rebutted by a fact admitted by the State. "It would seem," said the court, "that the defendant is a proper subject for the discipline of the church, but not for the discipline of the courts."—*Central Law Journal*.

### JUDICIAL FORESIGHT.

Judges, in their anxiety not to be misunderstood, occasionally add to their judgments a caution that they must not be taken to decide more than is actually involved in the case, and that if certain ingredients had been in the case they probably have arrived at a different conclusion. Last year, a case which excited much attention at the time was decided in the Court of Queen's Bench, and Mr. Justice Archibald, in giving his opinion, qualified it in a manner almost proving prescience of a case which followed some seven months afterwards. In the first case, *Harris v. Nickerson*, 42 Law



## JUDICIAL FORESIGHT—CROSS-EXAMINATION AS TO CHARACTER.

J. Rep. (N. S.) Q.B. 171, a sale had been advertised by the defendant, and the plaintiff attended to buy. At the sale, some articles which the plaintiff intended to purchase were withdrawn, so the plaintiff lost his time and his travelling expenses, and he brought a County Court action to recover these. The County Court judge found a verdict for the plaintiff; but the Court of Queen's Bench reversed that decision. Mr. Justice Archibald said that he could quite understand that if a *fraudulent* representation were made that a sale was to be held, a person who thereby lost money might maintain an action. The event showed the wisdom of the learned judge. In *Richardson v. Sylvester*, in the January number of our Reports, it appeared that the defendant had a farm to be let by tender. The plaintiff, upon seeing this, spent money in viewing the farm and otherwise. The defendant knew he had no power to let the farm, but inserted the advertisement to serve some other purpose of his own. The County Court judge nonsuited the plaintiff; but the Court of Queen's Bench reversed that decision on the well-known ground that the defendant had made a fraudulent representation, and that the plaintiff had acted on it and suffered loss—exactly, therefore, justifying the foresight of Mr. Justice Archibald.—*Law Journal*.

## CROSS-EXAMINATION AS TO CHARACTER.

The high and ancient authority of Quintilian is often cited in favour of the practice of cross-examining witnesses as to their antecedents in life for the purpose of discrediting them, but the utmost difficulty has been felt in practice in determining what limit ought to be placed upon this privilege of the advocate. Quintilian says, *Si quid in ejus vitam dici poterit, infamia criminum destruendus*; but we may be sure that Quintilian would not have reckoned among *crimina* many of the acts which, in English Courts, are supposed to weaken the effect of the evidence of the person admitting them. In fact, when an attempt is made to forge a link between what is called character and veracity, the main difficulty lies in deciding what are, and what are not, proper materials for the purpose. Into the

inquiry a whole host of moral, social, even religious problems are apt to thrust themselves—problems upon which the greatest masters of casuistry might agree to differ. Mr. Best does not help us in the matter, and Mr. Taylor only points out certain classes of questions, such as those going back to transactions of remote date, and those referring to mere improprieties, as fit subjects for exclusion. The cross-examination of Lord Bellew in *The Queen v. Castro* forms an excellent theme for controversy, and might be recommended, after the trial is over, to the attention of legal debating societies. Pending a decision, by some authority, on that line of cross-examination, we may refer to the case of *Stocks v. Ellis*, in the current number of our Reports, (42 Law J. Rep. (N.S.) Q.B. 241). There a commission had issued to examine a witness in the United States. The object of interrogating the witness was to obtain evidence upon the issue in the cause, whether certain yarns had been properly spun or not. The other side proposed to put certain cross interrogatories to the witness in order to extract from him an admission that he had gone to America with the wife of another man, leaving his own wife and ten children behind without means of support. The Court did not decide that these questions could not be put on cross-examination in open court, but rather intimated that they could. But the questions were disallowed on the Commission, because the Court thought that they were inserted not to test the credit of the witness, but to deter him from giving evidence altogether, and so to deprive one of the parties to the cause of testimony. The decision of the Court is a step in the right direction, and we are inclined to wish that it had gone a little further. Would any judge tell the jury that a man called to give an opinion whether certain yarns spun under his superintendence were well done or badly done, ought to be treated as less worthy of belief upon such a topic because he had committed a conjugal and social offence of the kind described.—*Law Journal*.

## CANADA REPORTS.

## ONTARIO.

## NOTES OF RECENT DECISIONS.

## CHANCERY CHAMBERS.

## HIGGINS V. MANNING.

*Security for costs—Nature of property within the jurisdiction necessary to discharge order.*

[The REVEREND, 9th March—STRONG, V. C., 23rd March, 1874.]

A plaintiff resident abroad will not be released from giving security for costs, unless he shows that he has property to the value of \$400 within the jurisdiction, available in execution.

Leasehold property may be sufficient.

A plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth \$2666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave the defendants an option to purchase, and under its terms no rent or taxes were to be paid until the title had been quieted, or a certificate refused; and in the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending.

*Held* (by the REFEREE), that the conditions of the lease were of such a character as to make it doubtful whether the plaintiff's interest in the reversion would realize \$400 if sold under an execution; and application to discharge order for security dismissed.

*Held* (by STRONG, V. C., on affirming the order), that, if the plaintiff succeeded in the suit, the land would be subject to the debts of the plaintiff's ancestor; and if he failed, the purchase money, when payable by the lessees, would be payable not directly to the plaintiff, but to his ancestor's personal representative; that the plaintiff had not in fact such an interest in the property as could be directly reached by execution.

## SWETNAM V. SWETNAM.

*Administration order—When administrator may apply.*

[STRONG, V. C., on appeal from the REFEREE—23rd March, 1874.]

The fact of there being a deficiency of assets in an intestate's estate, by which all creditors become entitled to share *pari passu*, is sufficient to justify an application by an administrator

for an administration order, notwithstanding that the estate consists solely of personality.

## OUTRAM V. WYCKHOFF.

*Administration order—Will not proceed.*

[The REFEREE—24th March, 1874.]

An administration order, applied for against a person named as executor in the will, but who had not taken out letters Probate, was refused, there being no duly appointed personal representative before the Court. (See *Russell v. Morris*, L. R. 17 Eq.)

## QUEBEC REPORTS.

## SUPERIOR COURT.

THE QUEEN AND JOSEPH LOUGEE, et al., Justices of the Peace; and WARREN PAIGE, Petitioner, and JOHN GRIFFITH, Collector of Inland Revenue, Respondent.

*Tavern and Shop Licenses—32 Vic. Cap. 32, sec. 30—Power of Dominion and Local Legislatures—B. N. A. Act, sec. 92—Jurisdiction given to two Justices—Powers of more or less to act.*

*Held*, 1. That when two Justices of the Peace are appointed by statute to adjudicate upon complaints, more or less than two does not meet the requirement. 2. That the B. N. A. Act, sec. 92, ss. 15, confers power upon Local Legislatures to enforce laws, made upon subjects within their jurisdiction, by both fine and imprisonment.

SANBORN, J. —The petitioner in this case raises six objections to a conviction made by three Justices of the Peace, whereby he is condemned to pay two penalties, \$100, and costs \$28.46, for selling by retail spirituous liquors in the Temperance Hotel of William Paige, of Compton, and is ordered to be imprisoned for six months unless the amount awarded be sooner paid:

1.—That the tribunal constituted to adjudicate upon complaints under the License Act, as respects ordinary magistrates of the District, consists of "two Justices of the Peace for the District," and more or less than two does not meet the requirement.

2.—That there is no offence specified in the complaint to which the penalty is attached.

3.—That the conviction should be complete without reference to the complaint, and should be in the form provided by the Act.

4.—That the conviction containing an order of imprisonment upon the option of complainant should be declared bad, as time must be given after conviction for petitioner to pay, and then only, upon failure to pay, could the prosecutor declare his option for imprisonment without distress.

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5.—That petitioner had been illegally convicted of two offences without mention of the time when each was incurred.

6.—That the evidence is illegally applied to both charges indiscriminately, and sustains neither as to specific time, as alleged in the complaint.

There is a certain degree of force in all these objections. The conviction is obnoxious to criticism in all these particulars. As respects the first ground, I consider it a fatal objection. Under section 152 of the *Licence Act*, all actions or prosecutions when the sum or penalty demanded, or such sum and penalty combined, do not exceed one hundred dollars, may be brought before any two Justices of the Peace for the District, or a Judge of the Sessions of the Peace, or a Recorder, or a Police Magistrate or Sheriff.

By sub-section 2 of section 153 it is expressly declared that when such prosecution is brought before any two other Justices of the Peace (that is, any two other than a Judge of the Sessions, &c.,) the summons may be signed by one of them, but no other Justice shall sit or take part therein, unless by reason of their absence, or of the absence of one of them, nor yet in the latter case without the assent of the other of them. This last provision was made, doubtless, to prevent Justices unfavourable to the prosecution from coming in and taking the case out of the hands of those who were first seized of it, and to prevent unseemly divisions among magistrates; but the enactment cannot operate in one way and not in the other.

There are certain expressions in the Act which seem to presume that more than two Justices may sit. Jurisdiction cannot be conferred by inference. It is expressly given to a certain tribunal, and none other can exercise it. Oke says: "The special authority given to Justices must be exactly pursued according to the letter of the Act by which it is created, or their acts will not be good." Oke's *Magisterial Synopsis*, p. 38. The same author says: "Where the statute refers the matter to the next Justice, or to any two Justices, no other but the one answering that description, or those having jurisdiction by common law or Act of Parliament, has any authority, and it does not enable them to act in any county." (*Idem*, p. 10.) These special jurisdictions are numerous in England, created by various Acts, so much so that this author has provided a table showing under the various Acts giving summary jurisdiction, in one column the penalties, in another the right of appeal or other wise, and in another the

number of Justices or the special tribunal to hear. The principle is recognized by other writers, and amongst these by Tomlins in his work on the Office and Duties of Justices of the Peace, and by Dwarria on Statutes, and by Paley on Convictions. The doctrine is based on several decisions, among which are the *Saunders case*, *Kite v. Lane*, and *Re Peerless*. It is said by respondent that petitioner accepted the jurisdiction, by pleading and not objecting to it, This cannot give to a Court jurisdiction when it has none by law. Magistrates under penal acts have no jurisdiction except such as is conferred by statute, and in the manner in which it is given by the statute: Tomlin's J. P., p. 120-4; Dwarria on Stat., p. 53; Paley on Convictions, pp. 15 and 16; *Saunders case*, 1 Saunders, 263; *Re Peerless*, 12 Q.B., 643; *Kite v. Lane*, 8 C. L. R., 44; *Regina v. Willocks*, 53 C. L. R., 315. Upon this ground the conviction must be quashed. There are other points raised here which are of sufficient practical interest to deserve consideration.

The second objection, that no offence is charged, I do not consider good for the reason given, that there should have been specific allegations that there was a sale in less quantity than 3½ pints. The word "retail" under section 196 is made to mean this, and is a sufficient averment to meet the requirements of section 2. There is, however, a very important variance which was not mentioned in the argument. The complaint is, that petitioner did vend, sell, retail, &c., in the Temperance Hotel of William Paige. The penalty is incurred, under the second section of the Act, for selling in the person's own house or premises, or in or upon any house, boat or barge, &c., upon frozen water; but not for selling in the house of another. Why this Act is so restrictive I cannot say; but it is so. It is true that under section 170 the delivery of spirits in a tavern is declared a violation of the first and second sections, but this does not enable a party to sue for a penalty in any other terms than those mentioned in the second section. The Act very illogically makes a sale in a tavern proof of sale in one's own house, or upon one's own premises, or in a building upon frozen water, but it does not warrant a conviction unless the complaint is for an offence described in said 2nd section. The conviction must describe the offence according to the statute: *Cloud v. Turfrey*, 9 C. L. R., 596; *Rae v. Walsh*, 28 C. L. R., 125; Paley on Convictions, p. 67; 2 Oke, 182.

The third objection, that the conviction

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should have been in the form given by the Act and should be separate from the complaint, is not without reason. The Act says, "these forms or others of like effect." A conviction which is not perfect in itself is not a form "of like effect." There may be an informal conviction which may be extended: Paley on Convictions, pp. 61-2. In fact this is a common practice, and it has been held that the formal conviction can be made at any time before the record is sent upon Certiorari: *Selwood v. Mount*, 48 C. L. R., 55. It has even been held that such formal conviction can be drawn up and substituted for the informal one at any time before the conviction is quashed: *Cartor v. Grecian*, 66 C. L. R., 216. The informal conviction as sent up in this case is certainly objectionable.

The fourth objection is that the option of prosecution for imprisonment instead of distress is no part of the conviction, and being included therein vitiates the conviction. The regular mode, undoubtedly, is, first to convict, then the defendant is expected to pay *instantly*; if he does not, the prosecutor may choose imprisonment under the Act, instead of distress. There is a reported case in which, under like circumstances, immediate imprisonment was held good, even when defendant was not present at the time of conviction. In that case, however, the conviction appears to have been entered, and the order for imprisonment was a subsequent act: *Arnold v. Dimsdale*, 75 C. L. R., 579.

This adjudication of imprisonment, being a substantive part of the conviction, leads me to consider the question decided by Mr. Justice Torrance, as well as by Mr. Justice Drummond in the Papin case. (*Ex parte Papin*, 16 L. C. J., 319 and 8 C. L. J., p. 122.) It is there held that the British North America Act does not confer power (sec. 92, ss. 15) upon the Local Legislature to enforce laws made upon subjects within its jurisdiction by both fine and imprisonment at the same time. I cannot agree with this holding. The words of the Imperial Act are: "the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." It was held in the case referred to that only one of these modes of punishment could be exercised at one time, because the enactment is in the alternative, as indicated by the word "or." I think it was intended by this section to give the range of these modes of punishment, not one or other of them and only one at a time. The word "or" is

not necessarily disjunctive in all cases. It is sometimes a mere connective. For instance, Art. 325 of the Civil Code provides for interdiction in case of "imbecility, insanity or madness." Ray, in his Medical Jurisprudence, classifies under the general head of insanity, idiocy, imbecility, mania and dementia, and remarks, "It is not pretended that any classification can be rigidly correct, for such divisions have not been made by nature and cannot be observed in practice": Ray's Medical Jurisprudence of Insanity, p. 84. The word "or" in this instance cannot certainly be used in a disjunctive sense. Dodderidge, J., in *Crenwick v. Rokeby*, 2 Bulsts., 47; Dwaris on Statutes, p. 773 — said, "When the sense is the same the words 'and' and 'or' are all one, and the words conjunctive and disjunctive are to be taken *promiscue*." I take it, at all events, that there is sufficient ambiguity in the expression to warrant a resort to the rules of interpretation where there is want of explicitness in the words of the statute. The B. N. A. Act, conferring legislative powers, is not to be construed rigorously, like a penal act conferring judicial powers. Prior to the B. N. America Act there can be no doubt that each Province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the Provincial Legislature by fine, penalty and imprisonment, using discretion as to one or all, as circumstances might require. It is a generally accepted doctrine that where the Imperial Government has granted powers to a colony, it never withdraws them. This doctrine is recognised in *Phillips v. Eyre*, Law Rep. (Q. B. p. 42.)

If the Imperial Act is to be understood in the reductive sense, and the Provincial Legislature can only enforce its laws by fine, penalty or imprisonment, taking its option by one of the three modes, but by only one of the three modes, then a right and power which existed before that Act was passed has been taken away, inasmuch as the Provincial Legislature has exclusive jurisdiction over certain classes of subjects, and if it has not the large powers that existed under the old constitutional acts, it has been taken away altogether; and the inference necessarily follows that it was intended, contrary to constitutional maxims of legislation, to abridge our powers, and it has been done.

This conclusion should not be reached unless we are forced to it by explicit enactment, or by evident intentment gathered from the Act generally. Chancellor Kent says (Kent's Commentaries, vol. 1, pp. 431, 434.) "It is an estab-

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lished rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of the terms." Again he says: "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered; 1. What was the common law before the Act. 2. What was the mischief against which the common law did not provide. 3. What remedy it provided to cover the defect; and 4. The true reason of the remedy." Applying these rules in their spirit, we must consider what legislative powers existed in the several Provinces of the Dominion prior to the passing of the British North America Act, and was it the intention to abridge these powers, or simply to make a new distribution of them? I think, plainly the latter. The words "by fine, penalty, or imprisonment," were not so well chosen as more definite language, to express the intention of the legislators, but I cannot think it was intended to give power to the Provincial Legislature to exercise only one of these modes of punishment at a time in any particular Act. It must have been intended to apply each according to the circumstances and gravity of the offence, and to use both or all when required. If the expression "fine, penalty, or imprisonment," is to be understood distributively as between penalty and imprisonment, it must be so understood as between fine and penalty, which would create a distinction too subtle for practical application. In fact the words fine and penalty are so alike that the one runs into the other. Dwaris says: (Dwaris on Stat., p. 704) "In construing Acts of Parliament, judges are to look at the language of the whole Act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and they can collect, from more large and extensive expressions, used in other parts, the real intention of the Legislature, it is their duty to give effect to the larger expressions." For these reasons I am of opinion that the Provincial Legislature has not exceeded its powers in enforcing the License Act, or any other law relating to the class of subjects within its jurisdiction, by all the modes mentioned, used separately or together, according to circumstances.

The conviction here is for two offences, incurring two penalties, and it is urged that the time and place should be definitely stated under sec. 158. This objection has much force. In such

case the conviction should be full for each offence, specifying the offence, time, place and penalty. This is in accordance with English practice where similar law was in force (1 Oke's Mag. Syn., 175).

The sixth objection is that the evidence was taken illegally upon both charges indiscriminately. This was a matter within the discretion of the Justices, and is not a ground for *certiorari*.

The conviction will be quashed, but without costs, as the revenue officer acts on behalf of the Government.

## ENGLISH REPORTS.

### ELECTION CASES.

#### TAUNTON ELECTION PETITION.

##### Agency.

To render a candidate responsible for the unlawful acts of persons who have supported his canvass, he must be proved by himself, or his authorized agents, to have employed such persons to act on his behalf, or to some extent put himself in their hands, or to have made common cause with them for the purpose of promoting his election.

[Ir. Law Times, 1874, p. 74.—Jan. 26.]

GROVE, J.—in delivering judgment, stated that the respondent was charged with bribery and treating by himself and his agents, and that there was also an imputation of general bribery and treating. He intimated that there were no proper grounds for making any personal imputation against the respondent, and that with regard to general bribery and treating and corruption so as to taint the whole constituency, and thus render the election void, he saw no reason for coming to the conclusion that extensive bribery or corruption prevailed at the election. He then proceeded to say:—I come now to the point upon which the great contest in this case arose. Did the respondent, not by himself or by any conscious authority, but by the hands of an agent or agents for whom he is responsible, so bribe or treat that this election must be declared void? The law of agency, as applied to election petitions, has been sufficiently expressed by different learned judges, some of whom have likened it to the relation of master and servant, and another to the employer of persons to run a race for him; but no exact definition, meeting all cases, has, as far as I am aware, been given. Two learned judges—the late Mr. Justice Willes, and Mr. Justice Blackburn—have pointed out the difficulties of arriving at one. All agree that the relation is not the Common Law one of principal and agent,

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but that the candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or, indeed, in violation of express injunction. So far as regards the present case, I am of opinion that to establish agency for which the candidate would be responsible, he must be proved by himself or by his authorized agent, to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause with them for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate with responsibility, must, it seems to me, be a question of degree and of evidence to be judged of by the Election Petition Tribunal. Mere non-interference with persons, who, feeling interested in the success of the candidate, may act in support of his canvass, is not sufficient, in my judgment, to saddle the candidate with any unlawful acts of theirs of which the tribunal is satisfied he or his authorized agent is ignorant. It would be vain to attempt an exhaustive definition, and possibly exception may be taken to the approximate limitation which I have endeavoured to express. It must also be borne in mind in these cases that, although the object of the statute by which the tribunal of election judges was created was to prevent corrupt practices, still the tribunal is a judicial and not an inquisitorial one. It is a Court to hear and determine according to law, and not a Commission armed with powers to inquire into and suppress corruption. Without expressing myself in equally strong terms with Baron Martin in the Wigan case, I am of opinion that the evidence of corrupt practice must establish affirmatively, to the reasonable satisfaction of the judge, that the acts complained of were done. The learned judge then proceeded to consider the evidence in the case. Witnesses were called who said they had seen a man named Rollings, against whom bribery and treating were alleged, either accompanying Sir Henry James during his actual canvass, or so in company with him as to lead to a reasonable inference that he was aiding him in his canvass. The best of these witnesses admitted that they had only seen the backs of Sir Henry James and the man with him. The other evidence was slender, and when Sir Henry James was examined he most emphatically contradicted it, stating that, if he had met him in the street he did not know him, and that most certainly he never canvassed with him, or with his sanction for him. It was admitted by the counsel for the petitioners that the fair result of

the evidence was that there was not enough to satisfy me of any agency deduced from personal canvass with the candidate himself with the exception of Turner. I am clearly of this opinion, and it applies also to Turner, Stuckey, and Govier, and I decide that on the whole case there was no reasonable evidence to satisfy me of agency by personally accompanying the candidate on his canvass. The learned judge, after stating that it was admitted that Burman was Sir Henry James's agent, for whose acts he was responsible, commented on Smith's evidence with regard to the sale of timber and the payment of £5 for drink, and stated that it was obvious that Smith came forward under circumstances which threw the greatest suspicion on his testimony. He came forward as an informer of a corrupt transaction to which he had been a party, for he had induced his daughter knowingly to make a false and fraudulent alteration in a bill to enable Rollings to obtain repayment from the respondent or from some agent of his by false pretences. As he admitted having bribed a voter, and his antecedents were far from satisfactory, he looked upon his evidence, not as that of a credible witness, but to see how far it was corroborated. His wife was called to support his veracity, and it was alleged that she had detected a conspiracy to injure Farrant and Brannan; but it was admitted that £15 had been paid by Farrant and Brannan to Poole. Smith was also said to have received money from Small to bribe, but the evidence of the bribery by Smith was utterly unworthy of credit. Here Rollings was said to have treated voters, but there was little or no evidence to connect him with the respondent, although he was frequently alleged to have been in company with Burman, and had been seen to go into committee rooms—Sir Henry James having no committee-rooms in the ordinary election sense of the term. The evidence was of very little value, as many witnesses could not fix dates; the times and occasions had been probably multiplied by different persons called, and most of them spoke to the facts happening before the committee-room was really taken. Other evidence of small bribes or offers to bribe and treat was adduced as having been committed by Stuckey, Turner, and Govier, who were alleged to be agents, for whom Sir Henry James was said to be responsible. The best of these cases was that deposed to by a man named Mogg, a man of the highest character, who gave his evidence with remarkable apparent truthfulness, and, small as the incident is, the question of Sir Henry James's seat might have depended on

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the question of Govier's agency, but no evidence of his agency was given by the petitioners, beyond his having paid for Burman small sums for services connected with the canvass of Sir Henry James. The learned judge then continued as follows:—A *prima facie* case was made which certainly had an impression upon me, viewing, in the light of probabilities, the evidence which from the character of the witnesses—at least many of them—could not be regarded as thoroughly reliable. Serjeant Ballantyne did not propose to call Rollings, perhaps fearing damaging disclosures, and I suggested his being called, and I think the truth has more fully appeared in consequence. For the respondent were called himself, Mr. Biron, Rollings, Burman, Cornish (Collard, who contradicted Jane Cox), and Turner. Sir Henry James disproved to my entire satisfaction any agency by canvassing on the part of Rollings, Turner, Stuckey, and Govier, and, so far as he was concerned, denied all agency but that of Burman. Rollings contradicted Smith, emphatically stating that the timber transaction was a pure business one, and that what he had done in furtherance of Sir Henry James's election was spontaneous, and he showed that his evidence, in the main, might be relied on. Burman gave his evidence in a singularly candid and apparently truthful manner, shrinking from no inquiry, exhibiting evidences of veracity in incidental matters, and answering questions against himself; so that he was either a most truthful witness or a consummate actor, and no hint or insinuation was made as to his antecedents. He denied Smith's story, and stated that he had seen Rollings but rarely during the election, and had not employed him directly or indirectly to promote Sir Henry James's election. The case does not depend on the veracity of Smith and Rollings further than so far as the former directly contradicts Burman. I hesitate to decide between them, as the statements of Smith directly implicating Burman are entirely uncorroborated. It is enough to say that if I believe Burman's evidence, all agency traced through him is displaced, and I do believe Burman's evidence, and cannot imagine that such unassailable evidence is a piece of accomplished acting; and if it were, he would not be a man likely to put himself in the power of such a man as Smith for a very trifling consideration. With regard to the cases of Turner, Stuckey, and Govier, I am inclined to believe Turner, though I regret that Stuckey and Govier were not called. I consider that neither they nor Turner were proved to be agents for whose acts the respondent was responsible. Govier was stated

by Burman to have assisted him as a volunteer in paying some of the petty cash, but there was no evidence, in my judgment, to fix him with agency in promoting the election, even giving a wide latitude to these relations. One other point was urged much more in reply than in opening the petitioner's case by Mr. Russell—that the respondent and his agents, by having mixed themselves with and availed themselves of the aid of the members of the Labour League, were bound by their acts as by the acts of agents. I do not find that any corrupt acts charged were shown to have been committed by the Labour League as a body or any representative of theirs, and I am further of opinion that neither the respondent nor Burman did more than not interfere with persons who were assisting the candidate for reasons of their own: Burman, it is true, paid a particular bill, in which were some items which had been ordered by the Taunton Working-men's Liberal Association, and I believe the statement that he was, up to the time of his cross-examination, ignorant of having paid them. I am therefore of opinion that the petitioners have failed to prove agency, and that Sir Henry James was duly elected, and I shall report to that effect to the Speaker. Mr. Marshall's position was unassailable, but that of Mr. Brannan was open to observation with reference to the pecuniary transaction with Smith and the £15 paid to Poole. I am not satisfied with the way in which the evidence has been got up. I exonerate Mr. Ellis, but no doubt the shortcomings are owing to the youth and inexperience of Mr. Blake, who was responsible for the petition; and, considering the matter fully, I am of opinion that there is nothing to take the case out of the ordinary rule that costs follow the event and should be paid by the petitioners.

#### IN RE THE EXETER ELECTION PETITION.

*The Proceedings upon an Election Petition drop upon the dissolution of Parliament.*

[Solicitors' Journal, January 27, 1874.]

This was an application with reference to the Exeter Election Petition.

*Chandos Leigh* appeared for the petitioners.

*Petheram* for the respondents.

*Chandos Leigh* said that the petition had been appointed to be heard before Bramwell, B., on the 8th of February, but the question had now arisen as to what was the effect of the dissolution of Parliament. Under the circum-

## EXETER ELECTION PETITION—DIGEST OF ENGLISH LAW REPORTS.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1873.

*From the American Law Review.*

ABANDONMENT.—See CHARTER-PARTY, 2.

ACCESSORIES.—See EXTRADITION.

ACTION.—See CONTRACT, 3; PRINCIPAL AND AGENT, 2; RENT CHARGE; THEATRICAL ENGAGEMENT.

ADVANCE AGAINST FREIGHT.—See CHARTER-PARTY, 3.

AFFIDAVIT OF DOCUMENTS.

Where a bill was filed by the Republic of Liberia, the plaintiffs were ordered to file the usual affidavit, stating what documents, if any, they had relating to the matters in question.—*Republic of Liberia v. Imperial Bank*, L.R. 16 Eq. 179.

AGREEMENT.—See CONTRACT.

ALIMONY.

A husband who had been separated from his wife for many years had covenanted to pay, and had paid, a small annuity to his wife. The husband instituted a divorce suit against his wife because of her adultery, and the wife petitioned for alimony because of her husband's fortune having largely increased since said covenant to pay an annuity. No alimony was allowed.—*Powel v. Powel*, L.R. 3 P. & D. 55.

ALTERNATIVE CONTRACT.—See DAMAGES, 2.

ANNUITY.

The defendants by their negligence caused the death of R., who was under covenant to pay the plaintiff an annuity of £200 during their jointlives. An "accountant," acquainted with the business of life insurance, after referring to the "Carlisle Tables," testified as to the value of an annuity of £200 for the life of two persons of the respective ages of R. and the plaintiff. The judge instructed the jury that they might calculate the damages which the plaintiff was entitled to recover, by ascertaining the sum of money which would purchase an annuity of £200 for a person of the plaintiff's age, according to the average duration of human life. *Held*, that said witness was competent, though not an actuary; but that as the plaintiff had lost an annuity for the joint lives of herself and R., and as an annuity upon the plaintiff's life only would be of greater value, said instructions were erroneous.—*Rowley v. London and North Western Railway Co.*, L. R. 8 Ex. (Ex. Ch.) 221.

ARBITRATION.

Two parties, between whom there was great hostility, left certain matters in dispute to two arbitrators, who were to select a third. During the arbitration one of the parties lunched at his expense the arbitrator whom he had appointed the third arbitrator, his solicitor, a

stances he and the counsel for the respondent had gone before Bramwell, B., who had drawn up a memorandum to be signed by them, but expressed the wish that the matter should be first brought before the Court. The memorandum was in these terms:—"Considering that the main object of the petition cannot now be attained, and that it is very doubtful whether by the dissolution of Parliament it is not abated and ended, which indeed we think it is; and there never having been any intention of charging Mr. Mills with personal bribery or corruption; we agree that all proceedings on the petition drop, and that the money deposited be paid out of court, and an order made to that effect." He now applied for a rule to carry out this arrangement. The statute (31 & 32 Vict. c. 125) said nothing as to a dissolution, but the 35th section said that a petition should be proceeded with, notwithstanding a prorogation, and the petition could not be withdrawn, because the statute said that in that event the petitioner should be liable to pay costs.

Lord COLERIDGE, C.J.—Before the Act passed the Parliamentary practice was that a petition dropped by dissolution, and you say that as the Act says nothing upon the point this practice continues. You simply want a rule that the money should be paid out of court.

*Petheram* said that he was instructed to consent to a rule that the money should be paid out of court on the distinct statement that there never had been any intention of charging Mr. Mills with personal bribery or corruption.

Lord COLERIDGE, C.J.—We have nothing to do with that. I am of opinion that the Queen having been pleased to dissolve Parliament—which the Court will take judicial notice—a case has occurred which is not provided for in the 31 & 32 Vict. c. 125; and therefore we must guide our proceedings by the old Parliamentary practice, according to which a petition dropped or abated by a dissolution. This being so, I have no doubt that there should be a rule to return the £1,000 which has been deposited.

Rule absolute granted.\*

\* *Sittings in Banco*.—Before Lord COLERIDGE, C.J., and KEATINGE and DENMAN, JJ.)



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short-hand reporter, and himself. *Held*, that said lunch furnished no ground for setting aside the award. The two arbitrators first appointed erroneously appointed a third as *umpire*, but, after the mistake was discovered, appointed a third arbitrator, and began proceeding *de novo*, and the parties to the submission agreed not to impugn the award. *Held*, that any irregularities in the proceedings were waived by beginning *de novo* and and by said agreement.—*Mosely v. Simpson*, L. R. 16 Eq. 226.

ASSIGNEE.—*See* RENT-CHARGE.

ATTESTATION.—*See* WILL.

ATTORNEY.—*See* COSTS.

AVERAGE.—*See* GENERAL AVERAGE.

AWARD.—*See* ARBITRATION.

BEQUEST.—*See* DEVISE; LEGACY; VESTED INTEREST; WILL.

BILL OF LADING.—*See* GENERAL AVERAGE.

BILLS AND NOTES.

1. An incorporated company sold to M. an instrument under the seal of the company, and countersigned by two directors and the secretary. The instrument was headed with the name of the company, was called a debenture, was numbered, and promised to pay the bearer, subject to the printed conditions indorsed thereon, £100 on May 1, 1872, or on any day on which the bond was entitled to be redeemed, according to said conditions. By said conditions a certain number of indentures were to be drawn periodically and paid off. M.'s indenture was stolen, and purchased in good faith by the plaintiff. The company, having notice of the robbery, refused to pay the indenture. It was admitted that such instruments were in practice treated as negotiable. *Held*, that the conditions of said instrument prevented it being a promissory note; also, that by contracting to pay the bearer the company could not render the title of the owner liable to be divested by theft and sale to a *bond fide* purchaser; and that the alleged custom could not annex such an incident to the contract. Whether an instrument under the seal of a corporation can be a promissory note, *quære*.—*Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

2. W. and B. were in partnership as attorneys. B., without authority from W., drew a bill, in a private transaction, upon the defendant in the firm name, and in the firm name indorsed it to the plaintiff for value. The defendant accepted the bill, which was dishonoured at maturity. *Held*, that the defendant was not estopped from denying that the bill had been indorsed by said firm.—*Garland v. Jacomb*, L. R. 8 Ex. (Ex. Ch.) 216.

*See* BANKRUPTCY, 2; DAMAGES, 2; TRUST, 2.

BROKER.

The plaintiffs, brokers in the London Stock Exchange, bought stocks for the defendant for the 15th of July, and on that day, by the defendant's instructions, carried them over to July 29th, the next account day, paying differences amounting to £1,688. On the 18th of July the plaintiffs, being unable to meet their

engagements, by reason of the defendant's and others' failing to make their due payments, were declared defaulters, and according to the rules of the Stock Exchange all their transactions were closed at the prices current on that day. The result of this was to make the plaintiffs liable to pay further differences on the stocks carried over for the defendant. *Held*, that the plaintiffs were not entitled to recover anything beyond said £1,688, as the defendant was not liable for the plaintiffs' losses caused by their own insolvency.—*Duncan v. Hill*, L. R. 8 Ex. (Ex. Ch.) 242; s. c. L. R. 6 Ex. 6 Am. 255; Law Rev. 98.

CANCELLATION. *See* WILLS, 4, 5.

CARRIER.—*See* NEGLIGENCE.

CAUSE OF ACTION.—*See* CONTRACT, 3.

CHARITY.—*See* CY PRES.

CHARTER-PARTY.

1. Declaration on a charter-party between the plaintiff and the owners of the C., "expected to be at Alexandria about 15th of December," alleging that the C. was not expected to be at Alexandria about the 15th December, but was in such part of the world and under such engagements that she could not be at Alexandria about the said day. Demurrer, and plea that the plaintiff knew the voyage the C. was on, and that said charter-party was made subject to the condition that the C. should fulfil her engagements and then proceed to Alexandria. Demurrer to the plea. *Held*, that the above-quoted words amounted to a warranty that the vessel was in such a position that she might reasonably be expected to beat Alexandria about the 15th December; but that said plea was a good one. Judgment for plaintiff on demurrer to the declaration, and for the defendant on demurrer to the plea.—*Corking v. Massey*, L. R. 8 C. P. 395.

2. On the 22nd November, 1871, the plaintiff entered into a charter-party with R., by which the vessel was to proceed from Liverpool to Newport, and there ship a cargo of iron rails for San Francisco, ordinary perils excepted, &c. On the 9th December, the plaintiff effected insurance with the defendants "on chartered freight valued at £2,900 at and from Liverpool to Newport in tow, while there, and thence to San Francisco," &c. The ship sailed Jan. 2, 1872, and on Jan. 4 took the rocks before arriving at Newport. On February 18 she was got into a place of safety, and was got off the rocks March 21. On August 16, 1872, the time of the trial, the vessel was still under repair. Due notice of abandonment was given, but was not accepted. On the 16th February, 1872, R. chartered, without the consent of the plaintiff, another ship, by which he forwarded the rails to San Francisco. The jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; and that such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the ship-owner and charterer. *Held* (by KEATING and BRETT, J. J., BOVILL, C. J., dissenting), that the charterer was absolved from his contract, and that therefore the

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plaintiff could recover the insurance on freight from the defendant.—*Jackson v. Union Marine Insurance Co.*, L. R. 8 C. P. 572.

3. The charterers of a vessel were bound by the charter-party to the following obligation: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and commission, and the master to indorse the amount so advanced upon his bills of lading." The charterers failed to insure their advance, and the vessel was lost. *Held*, that the charterers had no claim against the owners for repayment of their advance.—*Watson v. Shankland*, L. R. 2 H. L. Sc. 304.

See CUSTOM; FREIGHT.

CLASS.—See VESTED INTEREST.

CODICIL.—See WILL.

COMMON CARRIER.—See NEGLIGENCE.

COMPLICITY.—See EXTRADITION.

CONSTRUCTION.—See CHARTER-PARTY, 1.

CONTRACT.

1. The engineer of a railway company prepared specifications of the works to be executed on a proposed railway, and the plaintiffs offered to construct the railway for a sum equal to the total of the prices at which the plaintiffs fixed the items in said specifications. A contract under seal was then entered into between the company and the plaintiffs, wherein the latter agreed to complete said railway for said sum. *Held*, that the plaintiffs could not, under the circumstances, maintain a claim against the company on the ground that the work to be done was understated in said specifications.—*Sharpe v. San Paulo Railway Co.*, L. R. 8 Ch. 597.

2. The defendant sold the plaintiff his newsagency business for a sum, part of which was to be contingent upon the profits of the business for the ensuing two and one-half years. The defendant also agreed to superintend the plaintiff's business and obey his orders. Within the first year the plaintiff agreed with R. to discontinue his news business, transferring to R. such contracts and business as R. should elect to continue. The plaintiff then directed the defendant to discontinue sending news, and applied for an injunction. *Held*, that the plaintiff, having broken his implied covenant to carry on the business, was not entitled to an injunction to restrain the defendant breaking any other portion of the agreement.—*Telegraph Despatch and Intelligence Co. v. McLean*, L. R. 8 Ch. 658.

3. The plaintiff offered at B. to buy cotton, and the defendant accepted the offer at L., the cotton to be delivered at L. The plaintiff brought suit at B. for breach of contract. By statute an action can be brought in the district where the cause of action wholly or in part arose. *Held*, that the offer at B. was part of the cause of action, and that the suit was properly brought at B.—*Green v. Beach*, L. R. 8 Ex. 208.

CORPORATION.—See BILLS AND NOTES, 1.

COSTS.

Where an attorney brought an action without the authority of the plaintiff, the plaintiff was

held entitled to have the proceedings stayed without payment of costs.—*Reynolds v. Howell*, L. R. 8. Q. B. 398.

COVENANT.

The directors of the T. railway leased from the owners of the B. dock certain land adjoining the dock, to be used for the purpose of shipping goods from and into vessels entering the dock; and they covenanted that they would procure, so far as they should be able, all merchandise conveyed upon or along the said railway, or any part or branch thereof, for the purpose of being brought to the sea-coast for shipment, to be shipped into vessels in said dock, and would pay certain dues upon such merchandise; and that when any merchandise which should be conveyed upon or along the said railway, or any part or branch thereof, should be shipped into or out of any vessel in any dock other than the B. dock, they would pay the same dues that would have been payable on such merchandise if shipped into or out of a vessel in said B. dock. After this lease a company was authorized to construct certain docks and a line of railway thereto, and said T. railway was empowered to lease all the company's works, by Act of Parliament. The directors of the T. railway accordingly leased such works, and shipped goods from the company's docks and carried them over the leased line of railway, and abandoned the use of the B. dock. *Held*, that said directors had not broken their covenants; and that there were no dues payable in respect of goods shipped from or into said company's docks.—*Directors of the Taff Vale Railway Co. v. Macnabb*, L. R. 6 H. L. 169.

See CONTRACT, 2; LEASE, 1, 2.

CUL-DE-SAC.—See STREET.

CY. PRES.

Charitable trusts created in the seventeenth and eighteenth centuries in favor of poor prisoners in London, failed in consequence of the abolition of debtors' prisons. *Held*, that the trust funds could not be applied towards the establishment of an industrial school for children of persons convicted of crime and undergoing sentence.—*In re Prison Charities*, L. R. 16 Eq. 129.

DAMAGES.

1. A manufacturer of iron contracted to sell 150 tons of iron to the plaintiff, delivery to be twenty tons per month. Deliveries were not duly made, and the plaintiff partly supplied the deficiency by buying iron in the market. The seller filed a petition in bankruptcy, and the purchaser claimed to prove the difference between the contract price of the whole amount of iron undelivered and the market-price at the time of filing the petition. The value of iron had greatly risen. *Held*, that the purchaser could only prove for the differences between the contract price and the market-price at the time when the monthly deliveries should have been made.—*Ex parte Llansamlet Tin Plate Co. In re Voss*, L. R. 16 Eq. 155.

2. Declaration stating that defendant had agreed to present certain bills to B. for acceptance, and if, after acceptance, the bills were

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not paid, then to return the bills to the plaintiff or pay him the amount of the same; that the bills were presented, accepted, and not paid, but that the defendant had not returned the bills nor paid the amount thereof to the plaintiff. No plea was put in. *Held* (by KEATING, BRETT, and GROVE, J. J.), that the measure of damages was the amount of the bills; (by BOVILL, C. J., dissenting), that it was the value of the bills (assessed by the jury at one farthing).—*Deverill v. Burnell*, L. R. 8 C. P. 475.

See ANNUITY; INSURANCE, 1; LEASE.

DEBENTURE.—See BILLS AND NOTES, 1.

DEBT.—See RENT CHARGE.

DEDICATION.

By statute, a local board of health was authorized to cause the ditches at the sides of or across public roads to be filled up, and to substitute pipe or other drains alongside or across such roads. Between a public road and the plaintiff's enclosed land there was a strip of land nine feet wide. This strip comprised a fence of posts and rails two feet high, fixed in a strip of greensward one foot wide, on the outer edge of said strip of land; then a ditch five feet wide; then a strip of greensward three feet wide, next to the plaintiff's enclosed estate. There was a similar strip of land with similar posts and rails fronting the estate of the adjoining owner, where no ditch existed. The posts in the strip fronting the plaintiff's land had existed forty years, and had been repaired by the plaintiff from time to time, and occasionally, without the knowledge of the plaintiff, by the surveyor of highways. *Held*, that the said Board had no right to fill up the ditch in said strip of land, or cause the posts and rails to be removed.—*Tutill v. West Ham Local Board of Health*, L. R. 8 Q. B. 447.

DEPOSITION.—See INTERROGATORIES.

DEVISE.

A testatrix devised "all that my share and interest in the lands known by the name of D., in the parish of K., now in the occupation of E." There was no residuary devise. Part of the lands known as D. was situated in the parish of L., but formed part of enclosures in the parish of K., and another part was in the occupation of M. at the date of the will and the death of the testatrix. *Held*, that all of said lands passed under the devise.—*Hardwick v. Hardwick*, L. R. 16 Eq. 168.

See VESTED INTEREST.

EGYPT.—See SOVEREIGN PRINCE.

ELECTION.

By indenture made in 1850, between a husband and wife of the first part, the wife's father of the second part, and four trustees of the third part, and reciting that upon the treaty for the marriage it was agreed that certain stock belonging to the husband, and a reversionary interest belonging to the wife, should be settled upon the trusts thereafter mentioned, and that the wife's father had agreed to transfer certain shares to said trustees

to be settled upon the trusts thereafter mentioned, it was declared that said trustees should pay the income of the husband's stock, to him for life, and after his decease to his wife for life; and should pay during the joint lives of said husband and wife one moiety of the income of said shares to the husband and the other moiety to the wife, for her separate use, and, after the decease of either, should pay the whole income to the survivor for life; and after the decease of the survivor, should hold all of the above funds upon trusts for the children of the marriage. And it was lastly witnessed that, in pursuance of said agreement, the wife, with the privity of her husband, assigned her said reversionary interest to said trustees, to hold on the same trusts as said shares. In 1865 the marriage was dissolved, the order nisi having been made in 1864. In 1871 the said reversionary interest came into possession. *Held*, that the wife must elect between the benefits given her by said settlement and her right to said reversion, free from the settlement; and that if she elected to take against the settlement, she must account for the income received under the settlement from the date of the order nisi.—*Codrington v. Lindsay*, L. R. 8 Ch. 578.

EQUITY.—See AFFIDAVIT OF DOCUMENTS; FOREIGN JUDGMENT; INJUNCTION.

ERASURE.—See WILL, 4.

ENTROPPEL.—See BILLS AND NOTES, 2; LEASE, 1.

EVIDENCE.—See ANNUITY; INTERROGATORIES; NEGLIGENCE; WILL, 4.

EXECUTORS AND ADMINISTRATORS.

An executor employed the solicitor who had drawn the will of the testatrix to prove the will, and to settle a claim against the estate. The solicitor wrote to the executor that the claim could be settled by paying a certain sum, which the executor thereupon sent the solicitor. Five months later the executor discovered that said money had been misappropriated by the solicitor. *Held*, that, under the circumstances, the executor should not be charged with the loss.—*In re Bird. Oriental Commercial Bank v. Savin*, L. R. 16 Eq. 203.

See PLEADING.

EXTRADITION.

England is, by treaty with Belgium, bound to give up persons accused of certain crimes, provided the particular crime charged is included in the Extradition Act. Among such crimes are "crimes by bankruptcy against bankruptcy law." *Held*, that the treaty did not extend to persons guilty of complicity in fraudulent bankruptcy.—*In re Counhays*, L. R. 8 Q. B. 410.

FORECLOSURE.—See MORTGAGE.

FOREIGN JUDGMENT.

A bill in equity, praying an injunction to restrain a suit upon a foreign judgment alleged to have been obtained by fraud, was refused, on the ground that fraud was a good defence at law to such a judgment.—*Ochsenbein v. Papelier*, L. R. 8 Ch. 695.

## DIGEST OF ENGLISH LAW REPORTS.

FOREIGN PRINCIPAL.—*See* PRINCIPAL AND AGENT.FRANCHISE.—*See* LEASE.

## FRAUDS, STATUTE OF.

The plaintiff alleged that he had assigned to the defendant an agreement for the lease of a shop and stables, with the understanding that the defendant should hold the stables in trust for the plaintiff. *Held*, that the Statute of Frauds had no application to the case, and that the defendant was a trustee of the stables for the plaintiff.—*Booth v. Turlie*, L. R. 16 Eq. 182.

## FREIGHT.

By charter-party a vessel was to proceed to Riga, there be provided with a full cargo, and then proceed to London and deliver the same, on being paid freight as follows: a lump sum of £315. There was the usual exception of sea risks; and the freight was to be paid half on arrival and the remainder on the right delivery of the cargo. A cargo was loaded and part lost by sea risk. *Held*, that shipowner was entitled to the whole of said £315.—*Robinson v. Knights*, L. R. 8 C. P. 465; *Merchant Shipping Co. v. Arncliffe*, L. R. 8 C. P. 469 (2).

*See* CHARTY-PARTY, 2, 3.

## GENERAL AVERAGE.

Bark was loaded on a general ship "average, if any, to be adjusted according to British custom." A hole was cut in the vessel for the purpose of extinguishing a fire which broke out in the hold, and the water which came in destroyed said bark. By custom of British average adjusters, such a loss is not a general average loss. *Held*, that the owner of the bark was not entitled to general average contribution.—*Stewart v. West India and Pacific Steamship Co.*, L. R. 8 Q. B. (Ex. Ch.) 362.

GUARDIAN.—*See* RELIGIOUS EDUCATION.HOTCHPOT.—*See* LEGACY, 1.HUSBAND AND WIFE.—*See* ELECTION.ILLEGITIMATE CHILDREN.—*See* LEGACY, 3.IMPLIED CONTRACT.—*See* SALE.

## INJUNCTION.

An interim injunction to restrain a sale expected to take place immediately was granted on motion, and before bill filed, on the plaintiff giving an undertaking to file a bill and affidavit in the course of the day.—*Thorneloe v. Skaines*, L. R. 16 Eq. 126.

*See* CONTRACT, 2; THEATRICAL ENGAGEMENT.INQUISITION.—*See* TRUST, 3.

## INSANITY.

Discussion as to what degree of repulsion of a parent from his child amounts to such mental delusion as will justify setting aside a will made under the influence of such repulsion.—*Boughton v. Knight*, L. R. 8 P. & D. 64. (And see case as reported *infra*.)

*See* LUNACY; TRUST, 3.

## INSURANCE.

1. The plaintiff effected an insurance "on 1711 packages teas" by the "E." from New York to London, valued at \$31,000, and against the usual perils, "and all losses and misfortunes that shall come to the hurt, detriment, or damage of the said goods or any part thereof, occasioned by sea perils." There was a special warranty, as follows: "warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty, or mouldy, except caused by actual contact of sea-water with the articles damaged, occasioned by sea perils. In case of loss to hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable." 449 packages of the plaintiff's teas were injured by salt water. Teas are usually sold in the order of the consecutive numbers marked on the packages, and if the numbers are broken by some being omitted, or if some packages are damaged, a suspicion is created that the other packages may be affected, and such packages consequently, though sound, bring less prices than if no packages were damaged. Consequently the plaintiff's remaining 1262 packages brought less than they would if the 449 packages had not been damaged. *Held*, that the plaintiff could not recover from the insurance company for the loss on said 1262 packages.—*Cator v. Great Western Insurance Co. of New York*, L. R. 8 C. P. 552.

2. A vessel was insured against fire for a certain period in the Victoria Dock, with liberty to go to a dry dock. The vessel removed part of her paddle-wheels in the Victoria Dock, as was necessary in order to enable her to enter the dry dock. She entered the dry dock, was repaired, and then moored a little farther up the Thames, where she remained ten days, for the purpose of having her paddle-wheels replaced before returning to the Victoria Dock, and while so moored was burned. It was usual for steamers to remove their paddles before entering a dry dock, and said ten days was not an unreasonable time for replacing the paddle-wheels. *Held*, that the insurers were not liable for said loss.—*Pearson v. Commercial Union Insurance Co.*, L. R. 8 C. P. (Ex. Ch.) 548; a. c. 15 C. B. N. s. 364; 33 L. J. 85.

*See* ANNUITY; CHARTER-PARTY, 2.INTERNATIONAL LAW.—*See* SOVEREIGN PRINCE.

## INTERROGATORIES.

The court disallowed interrogatories upon a commission to take testimony abroad tending to discredit the witness, as being likely to deter the witness from testifying.—*Stocks v. Ellis*, L. R. 8 Q. B. 454.

*See* LIBEL.JUDGMENT.—*See* FOREIGN JUDGMENT; REPLEVIN.

## DIGEST OF ENGLISH LAW REPORTS.

**JURISDICTION.**—See CONTRACT, 3; SOVEREIGN

**LANDLORD AND TENANT.**—See LEASE.

**LAW, MISTAKE OF.**—See BANKRUPTCY, 2.

**LEASE.**

1. A lessor leased a dwelling-house, together with all lights thereto belonging or therewith used and enjoyed. The lessor, at the time of making the lease, held a four-year lease of the adjoining estate, and subsequently purchased the reversion of the estate. The lessor, more than four years from the time the lease was made, but before its termination, began to build a new building upon his estate, in such a manner as would interfere with the light of the house he had leased. Injunction to restrain lessor from so building refused. *Booth v. Alcock*, L. R. 8 Ch. 663.

2. The defendant let a house, with an agreement to put the premises in repair, and the lessee covenanted to keep the premises in repair. The iron covering of the shoot leading into the coal-cellar was, at the time of the demise, out of repair, so as to be dangerous. After the demise, and while the defendant's workmen were still executing said repairs, the plaintiff stepped upon said covering and was injured by its giving way. *Held*, that the defendant was not liable.—*Pretty v. Bickmors*, L. R. 8 C. P. 401.

3. A lease was made of "all that piece or parcel of woodland situate in B., and all that close called W., and all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in B., and that lodge or house thereupon built, commonly called B. lodge; and also all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in R., both which said warrens are known by the name of the B. warren, and extend themselves over the wastes of B., F., &c. *Held*, that, by the lease, the soil did not pass, but only a right to the conies and whatever was fairly incident to, or necessary for, the preserving and making profit of them.—*Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; s. c. L. R. 4 Ch. 562; 4 Am. Law Rev. 289.

See COVENANT.

**LEGACY.**

1. A testator gave his property equally among his daughters, directing F., one of them, to bring an estate she owned into hotchpot. After the date of the will, said estate was, by the advice of the testator, settled upon J. for life, remainder to her husband for life, remainder as J. should appoint among her children. The trustees sold the estate and held the proceeds upon the same trusts. *Held*, that said proceeds must be brought into account in respect of J.'s share.—*Middletown v. Windross*, L. R. 16 Eq. 212.

2. A testator gave £5000 to trustees in trust, to invest and to apply the income to and for the education of the testator's nephew, until the nephew should attain the age of twenty-four, and when he attained that age to pay him said principal sum: in case the

nephew should die under the age of twenty-four, the trustees to hold said principal upon trust for R. The nephew died under twenty-four, and, at the time of his death, said trustees held an accumulation of income. *Held*, that the legacy to the nephew was vested at the death of testator, liable to be divested in case the nephew should not attain twenty-four, and that the nephew's personal representative, and not R. or the testator's residuary legatee, was entitled to said accumulation of income.—*In re Peck's Trusts*, L. R. 16 Eq. 221.

3. A testator gave his personal estate to trustees, to hold in trust for his daughter for life, and after her decease to transfer the principal equally among the children of his daughter, whether by her present putative husband or by any other person whom she might marry. But, in case his daughter should die, leaving no issue, then over. For several years prior to, and at the date of the will, the daughter had been living with a man, whom she subsequently married, as his reputed wife, and at the date of the will had one son by her reputed husband, who was believed by the testator to be illegitimate. Said son was born in 1831, and his mother, who was sixty-seven years of age, and whose husband had died, petitioned with her son to have said principal paid to them jointly. *Held*, that the son had a vested remainder after his mother's life estate, and that said principal should be paid to the petitioners.—*In re Brown's Trust*, L. R. 16 Eq. 239.

See VESTED INTEREST.

**LETTER.**—See PRIVILEGED COMMUNICATIONS.

**LIBEL.**

Action for libel in charging the plaintiff with sending vessels to sea over-loaded, over-insured, and under-manned. Plea, that the several words and matters concerning the plaintiff were true. Particulars were offered with the plea. *Held*, that such an answer was more convenient than a special plea of justification, and allowable. The defendant being ordered to deliver to the plaintiff particulars stating the substance and the dates of the matter relied on, the court refused to allow the defendant to administer interrogatories to the plaintiff for the purpose of enabling the defendant to comply with said order.—*Gourley v. Plimsoil*, L. R. 8 C. P. 362.

**LIGHT.**—See LEASE, 1.

**LIMITATIONS, STATUTE OF.**

By statute, any person building beyond the general line of buildings may be summoned before a justice, who may order the demolition of such building; and no person shall be liable for the payment of any penalty or forfeiture under said statute for an offence cognizable before a justice unless complaint is made within six months from the discovery of such offence. *Held*, that the above limitation clause did not apply to the case of building beyond the general line of buildings.—*Vestry of Bermondsey v. Johnson*, L. R. 8 C. P. 441.

## DIGEST OF ENGLISH LAW REPORTS.

**MARRIED WOMAN.**—See ELECTION.

**MASTER.**—See BOTTOMRY BOND.

**MORTGAGE.**

On a bill by an equitable mortgagee, the court will direct a foreclosure, not a sale.—*James v. James*, L. R. 16 Eq. 153.

See REPLEVIN; TRUST, 4.

**MOTION.**

By statute, a judge, "upon the trial of any issue," may grant leave to move to enter a non-suit, &c. At a trial, which took place on Thursday, the judge refused such leave, but reconsidered the matter, and granted leave on the following Monday. *Held*, (by BOVILL, C. J., KEATING and GROVE, JJ.; BRETT, J., dissenting), that said leave was not granted upon the trial of the issue.—*Folkard v. Metropolitan Railway Co.*, L. R. 8 C. P. 470.

**NEGLIGENCE.**

A passenger in an omnibus was injured by a blow of the hoof one of the horses, who kicked through the front of the omnibus. There was no evidence that the horse was vicious, or a kicker, but two marks, as of kicks, were found beside the hole made by the above kick. It was shown that the consequences of kicking might have been obviated by a kicking strap. *Held*, that there was evidence of negligence on the part of the omnibus company, to go the jury.—*Simson v. London General Omnibus Co.*, L. R. 8 C. P. 390.

**NEW TRIAL.**

On a trial as to the testamentary capacity of a testatrix, the jury disagreed. On a second trial the jury found for the plaintiff, and an application for a new trial was refused. The plaintiff and certain other persons testified at each trial, and subsequently the plaintiff was found guilty of perjury at the latter trial. On the trial for perjury the above plaintiff could not testify, and he was convicted upon the testimony of said other persons who had testified in the first trials. An application for a new trial, made after the plaintiff's conviction for perjury, was refused.—*Davies v. Reynolds*, L. R. 3 P. & D. 90.

**NUISANCE.**—See LEASE, 2; WAY.

**OBSTRUCTION.**—See WAY.

**PARTNERSHIP.**—See BILLS AND NOTES, 2; PRINCIPAL AND AGENT, 3.

**PATENT.**

Two applications for the same patent were filed July 20 and July 23, respectively. The patent applied for July 23 was first sealed. *Held*, that under 15 & 16 Vict. c. 83, § 24, the patents took effect upon the days on which they were applied for.—*Saxby v. Hennett*, L. R. 8 Ex. 210.

**PENALTY.**—See SALE.

**PERIL OF THE SEAS.**—See FREIGHT.

**PERJURY.**—See NEW TRIAL.

**PLEADING.**

A bill was filed by a creditor for administration of a testator's estate, alleging that one of the defendants, who was named executor, was a debtor to the estate, and that his co-executor was insolvent and did not intend to take steps to secure the debt, and that said defendant, though he had not proved the will, had not renounced probate. The defendant answered, not admitting the debt. The plaintiff amended by introducing charges, showing advances from the testator to the defendant. The defendant then pleaded that he had renounced probate since his answer, and before the plaintiff had amended. *Held*, that the plea could not be sustained.—*Morley v. White*, L. R. 8 Ch. 731.

See CHARTER-PATY, 1; LIBEL.

**POWER.**—See TRUST, 8.

**PRACTICE.**—See COSTS; LIBEL.

**PRESUMPTION.**—See WILL, 2.

**PRINCIPAL AND AGENT.**

1. Iron was being unloaded from a cart for the purpose of being carried on board a ship. The defendant's foreman not being satisfied with the manner of unloading, got into the cart and threw out part of the iron and injured the plaintiff. It was the duty of the defendant, a stevedore, to carry the iron, after it was thrown from the cart, to the ship. *Held* (by GROVE and DENMAN, JJ., BRETT, J., dissenting), that it was a question for the jury whether the foreman was acting within the scope of his employment.—*Burns v. Poulson*, L. R. 8 C. P. 563.

2. A foreigner employed brokers to buy car-wheels for him. The defendant, in the presence of the foreigner, contracted to furnish wheels to the brokers, and subsequently failed to perform the contract. *Held*, that under the circumstances of the case the plaintiff, being a foreign principal, could neither sue nor be sued on said contract.—*Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313.

3. By agreement between a London firm and a Rangoon firm, the former firm was to purchase goods "on joint account," charge two per cent. commission, and send the goods to the Rangoon firm. The plaintiff, with no knowledge of this agreement, furnished goods to the London firm, which were exported to the Rangoon firm under the above agreement. *Held*, that the foreign firm at Rangoon was not liable as an undisclosed principal to the plaintiff for the price of the said goods.—*Hutton v. Bulloch*, L. R. 8 Q. B. 331.

See BOTTOMRY BOND; BROKER.

**PRIVILEGED COMMUNICATIONS.**

Where one defendant in a suit, being a solicitor, acted as agent of the solicitor on the record to collect evidence in the suit, the letters between him and his co-defendant were held to be privileged communications.—*Hamilton v. Nott*, L. R. 16 Eq. 112.

**RAILWAY.**—See STREET.

## DIGEST OF ENGLISH LAW REPORTS.

REAL ACTION.—*See* RENT-CHARGE.RECEIVER.—*See* TRUSTEE, 1.

RELIGIOUS EDUCATION.

A Catholic, being about to marry a Protestant woman, agreed verbally that the boys of the marriage should be brought up as Catholics, and the girls as Protestants. There was a daughter born, who was baptized a Protestant, with the knowledge of the father, who was, however, absent and ill, and who shortly before his death made a will directing his children to be brought up Catholics, and appointing his brother, a Catholic, their guardian. The daughter was brought up by the mother's family, who had no knowledge of said will, as Protestant until she was nine years old, when said guardian first claimed her. *Held*, that the father's right to have the child brought up as Catholic had been abandoned, and that said guardian would be restrained from interfering with the custody or education of the child.—*Andrews v. Salt*, L. R. 8 Ch. 622.

RENT-CHARGE.

Declaration that the defendant, being seized in fee of certain messuages, granted them to C., subject to a yearly rent-charge, which C. covenanted to pay; and that subsequently all the estate of C. became vested in the defendant, who did not pay said rent-charge. *Held*, that said rent-charge being in fee, debt would not lie at common law until the fee determined, and that the plaintiff would have been driven to a real action; but that real actions having been abolished by statute, an action of debt would lie.—*Thomas v. Sylvester*, L. R. 8 Q. B. 368.

REPAIRS.—*See* LEASE, 2.

REPLEVIN.

A mortgagor leased the mortgaged premises to the plaintiff. The mortgage gave the mortgagee power to distrain the goods of the mortgagor, in a certain event; and such event happening, the mortgagee by mistake distrained the plaintiff's goods. The plaintiff replevied and recovered the expenses of the replevin bond, and then brought trespass for further damages to said goods, and for trespass to the land. *Held*, that the judgment in replevin was a bar to the action for trespass to the goods; otherwise as to the action for trespass to the land; but that the defendant not having recognized the plaintiff as a tenant, was entitled to judgment in such action on a plea of not possessed.—*Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

REVOCATION.—*See* WILL, 4, 5.

SALE.

By 35 & 36 Vict. c. 74, sec. 2, any person who shall sell as unadulterated any article of food or drink which is adulterated, is subjected to a penalty. The respondent, a butter dealer, sold an inspector a pound of adulterated butter on being asked for "a pound of butter at 7d." *Held*, that there was an implied representation by the respondent that

the article he sold was unadulterated butter.—*Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337.

*See* MORTGAGE.SEAL.—*See* BILLS AND NOTES, 1.SETTLEMENT.—*See* ELECTION.

SOVEREIGN PRINCE.

A cause was instituted on behalf of the owner, master, crew, and passengers of the *Bataavier* against the steamship *Charkieh* and her freight for damages arising out of a collision. An appearance was entered under protest for the Khedive of Egypt, and a petition was filed stating that the *Charkieh* was the property of the Khedive, as reigning sovereign of the state of Egypt, and was a public vessel of the government and semi-sovereign state of Egypt, and praying the judge to declare that the court had no jurisdiction to entertain the suit. It appeared that the vessel was sent to England to be repaired, and had brought a cargo and advertised to carry one back, for the sake of lessening expense; that she was chartered to an English subject for her return voyage to Alexandria; that she was entered at the custom-house like an ordinary merchant vessel, and that all freights and passage money earned by her were received by the Egyptian minister of the interior as part of the public revenues of Egypt. *Held*, on the facts that the Khedive had failed to establish that he was entitled to the privileges of a sovereign prince; that if he were entitled to such privilege, it would not oust the jurisdiction of the court in this action; and that if such privilege existed, it had been waived with reference to the *Charkieh* by the action of the Khedive in engaging her in traffic.—*The Charkieh*, L. R. 4 Ad. & Ec. 59.

SPECIFICATION.—*See* CONTRACT, 1.STATUTE.—*See* CONTRACT, 3; MOTION; SALE; VOTE.STOCK EXCHANGE.—*See* BROKER.STOCKS.—*See* TRUST, 4.

STREET.

A *cul-de-sac*, into which the public has been allowed to enter for twenty years, is dedicated to the public, and is a public highway. A railway constructing its line under such *cul-de-sac* is not to pay compensation to the abutters.—*Souch v. East London Railway Co.*, L. R. 16 Eq. 108.

THEATRICAL ENGAGEMENT.

An actor, who had contracted to act at the plaintiff's theatre during the season of nine months, was restrained by injunction from acting at any place other than the plaintiff's theatre.—*Montague v. Flockton*, L. R. 16 Eq. 189.

TILLAGE.

In case any part of certain land was converted into "tillage," a tithe rent-charge became due. The owner of the land built a house thereon, and converted a part into garden ground and the remainder into orchard.

## DIGEST OF ENGLISH LAW REPORTS.

*Held*, that the land was not converted into tillage.—*Dudman v. Vigar*, L. R. 6 H. L. 212; s. c. L. R. 7 C. P. (Ex. Ch.) 72; L. R. 6 C. P. 470; 6 Am. Law Rev. 304. 699.

TITHE.—See TILLAGE.

TREATY.—See EXTRADITION.

TRESPASS.—See DEDICATION; REPLEVIN.

TRUST.

1. If a trustee will not take proper steps to enforce a claim against a debtor to the trust fund, the remedy of the *cestui qui trust* is to file a bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name.—*JAMES, L. J.*, in *Sharpe v. San Paulo Railway Co.*, L. R. Ch. 597.

2. Before executing a deed of assignment of his property, a debtor had deposited with his solicitor a bill of exchange as security for charges. At the time the bill became due nothing was due the solicitor, who, however, retained the bill and brought suit upon it, but recovered nothing, in consequence of the acceptor's bankruptcy. The creditors charged the trustee of the debtor with a breach of trust in leaving the bill with the solicitor, instead of claiming it and making the best terms possible with the acceptor. *Held*, that there was no breach of trust.—*Ex parte Ogle*. In *re Pilling*, L. R. 8 Ch. 711.

3. Three trustees had power to appoint their successors in case any of their number became unable to act. One of the trustees became of unsound mind, though he was not found so by inquisition, the other trustees appointed a new trustee in his place. *Held*, that the power was properly exercised.—*In re East*, L. R. 8 Ch. 735.

4. H. held, as trustee for the defendants, certain certificates of stock in a railway company as registered proprietor thereof. Such stock was issued to registered proprietors, and it was never noticed on the face of the certificates that the proprietor was a trustee. H. obtained advances from R. on deposit of the certificates as security, with a written agreement to execute a valid mortgage and transfer of the stock when requested. The defendants discovered the fraud of H., and gave R. notice that H. had been trustee for them. R. thereupon obtained a transfer of the certificates to himself. *Held*, that under the circumstances R. was entitled to the stock.—*Regina v. Shropshire Union Co.*, L. R. 8 Q. B. (Ex. Ch.) 421; s. c. L. R. 3. Q. B. 704.

See EXECUTORS AND ADMINISTRATORS;

FRAUDS, STATUTE OF.

VESTED INTEREST.

A testatrix gave a sum of money, payable at the decease of A., to the brothers and sisters of S., to be equally divided among them, share and share alike, the said shares to be vested interests on the majority or marriage of each; and the income, in the event of A.'s death, in the meantime to be paid towards the maintenance of said legatees. There was no

gift over. Two of the legatees survived A., and died under age and unmarried. *Held*, that the share of said two legatees passed to their legal personal representatives.—*Simpson v. Peach*, L. R. 16 Eq. 208.

See LEGACY, 2.

VOTE.

By statute, a person rated in respect of distinct premises in two or more wards shall be entitled to vote in such of said wards as he shall select, but not in more than one. A burgess on the roll for two wards voted first in one ward and immediately after in the other ward. *Held*, that by voting in the first ward the burgess made his selection, and that the fact of his voting afterward in another ward could not vitiate his previous vote.—*Regina v. Harrold*, L. R. 8 Q. B. 418.

WAIVER.—See ARBITRATION; SOVEREIGN PRINCE.

WARRANTY.—See CHARTER-PARTY, 1.

WAY.

P., the owner of an inn with a passage-way to the same from the street, agreed with M., an abuttor, to change the direction of the passage-way. M. accordingly conveyed to P. a small piece of land between said inn and the new passage-way, and granted to P., his heirs and assigns, "rights of way and passage at all times and for all purposes over a passage intended to run between the land conveyed and said street." The plaintiff, the lessee of the inn, brought a bill against M. and his tenants, alleging that some of the defendants, but which of them the plaintiff could not discover, blocked up the passage with carts and machinery for loading and unloading goods. *Held*, that the right of way was not a right in gross, but a right appurtenant, and passed to the plaintiff; that it was not necessary for the plaintiff to show what share each defendant had in causing the obstructions, and that an injunction should be granted.—*Thorpe v. Brumfit*, L. R. 8 Ch. 650.

See DEDICATION.

WILL.

1. A testator, having made a will and codicil, made another codicil, in which he stated his desire to cancel said will, and that a previous will should stand as his last will. The only previous instrument of the testator was a settlement on his marriage. *Held*, that said will was revoked whether the settlement could be incorporated in the probate or not.—*In the Goods of Gentry*, L. R. 3 P. & D. 80.

2. A testator's will had been originally engrossed on fifteen sheets of paper by a law stationer, with blanks for legatees and legacies, which were filled up by the testator. The fourth sheet had been removed, and replaced by one in the handwriting of the testator, but the original had been preserved. The number of the sheet incorporated in the will had been altered from seventeen to four. On the sixteenth sheet a codicil had been written by the testator, and on the eighteenth



## DIGEST OF ENGLISH LAW REPORTS—REVIEWS.

a schedule of property. The sheets of the will were tied together with tape. *Held*, that the presumption that the sheets bound together were so bound together at the time of the execution and attestation of the will was not rebutted by the facts of the case.—*Rees v. Rees*, L. R. 3 P. & D. 80.

3. A testator signed his will in the presence of two witnesses by making a mark thereon. One witness made a mark below the testator's mark, and the second witness then wrote the name of the testator opposite the testator's mark, and the word "witness," and the name of the first witness opposite his mark, but did not add his own name. *Held*, that the will was not properly attested.—*In the Goods of Enyon*, L. R. 3 P. & D. 92.

4. After execution of her will, a testatrix erased the name of a legatee and wrote the name of another over the erasure. The court being satisfied that the testatrix intended to revoke the first bequest only in case she had substituted another valid bequest, admitted evidence to show what the erased name was.—*In the Goods of McCabe*, L. R. 3 P. & D. 594.

5. A testatrix re-wrote the first part of her will on a separate piece of paper, and then tore off the first part of her old will and burnt it. She then rolled up the re-written portion with the remainder of her old will, which contained her own and the witnesses' signatures. *Held*, that as it appeared that the testatrix had intended to destroy a portion of her old will only in case a new portion was substituted therefor, probate must be granted of the portion of the old will which remained, together with the draft of the part destroyed.—*Dancer v. Crabb*, L. R. 3 P. & D. 98.

INSANITY; NEW TRIAL; VESTED INTEREST.

WITNESS.—See ANNUITY; WILL, 3.

WORDS.

"Leaving."—See LEGACY, 3.

"Payable."—See VESTED INTEREST.

"Upon."—See MOTION.

"Vested."—See VESTED INTEREST.

## REVIEWS.

EWART'S INDEX OF THE STATUTES—Second Edition. Toronto: R. Carswell, Law Publisher, &c., 1874.

The first edition of this useful little book had already become a "household word" in lawyers' offices in Toronto, when the second was announced. We welcome this especially, as it seems to prophesy that the time has come when we may expect every few years, as necessity demands, a new edition of an index, which it would now be most inconvenient to be without. The first edition included the

statutes, subsequent to consolidation, down to the year 1871. The one before us brings us down to, and inclusive of, the year 1873. The arrangement is a very practical one, which is just what is required for office use. It is simply impossible for any living man to make an index which would be entirely satisfactory to all; but Mr. Ewart has succeeded in so selecting and arranging his headings as to take rank in the highest grade of those who perform the ungrateful task of index-making, whose praise, after all, can only be the relative one of giving very general satisfaction to the large majority of their readers.

TABLE AND INDEX OF THE STATUTES OF THE DOMINION OF CANADA AND AMENDMENTS THERETO, AND AN INDEX TO THE IMPERIAL STATUTES AFFECTING CANADA. By R. J. Wicksteed, Esq., M.A., B.C.L., Barrister and Advocate, Law Department, House of Commons, Canada. Ottawa: McLean, Roger & Co., 1874.

Though of the same class as the book above noticed, it is essentially different in its scope and arrangement and in the nature of the information given. We cannot do better than quote the preface, or rather explanatory notice, which introduces the table and index.

"The subject of each Act is given briefly, after the year of the Reign and chapter, with the name of the Member who introduced the Bill, and the official number or letter under which it was brought in. The date of the Royal Assent is given after the first Act assented to on any day, but is not repeated unless the date changes, so that the assent to Acts as to which no date is mentioned, is to be understood to have been given on the day then last before mentioned. Then follow brief references to the Acts amended by that in question, or amending or affecting it, showing the sections, &c., repealed or amended, and, as far as the necessary degree of brevity admitted, the nature of the amendments. More than this has not been attempted, nor would space permit; further information must be sought in the chapters and sections indicated.

"The index to these Statutes has been made, under each letter of the alphabet, for the Acts of each Session or Volume separately but consecutively, and refers to the Acts as printed in such volume, without noticing the repeals or amendments; so that having found by this index the Act or section dealing with any subject, it will always be advisable to refer to such Act or section in the preceding table, to see whether it has been repealed or amended by any subsequent enactment.

## REVIEWS—FLOTSAM AND JETSAM.

"The INDEX TO IMPERIAL STATUTES comprises such only as having been passed with express reference to Canada, or any of the Provinces now composing it, or to the colonies generally, appear to have been wholly or partly in force or unrepealed at the end of the Session of the Parliament of the United Kingdom held in the year 1873, the date to which the table and Index to the Statutes of Canada are brought down."

The very name of the author is enough to inspire confidence, he being the son of our old friend, the invaluable and courteous Law Clerk of the House, who in 1856-7, as Law Clerk of the Legislative Assembly of Canada, prepared the Index of the Statutes which bears his name.

The Index before us is prepared as well for the use of members of the Legislature as for the Legal profession, and the necessary consequence is an arrangement of the alphabetical Index which, though novel, is ingeniously devised to give all necessary information to the progressive legislator, whilst at the same time doing as little injury as possible to its convenience as a guide to the practical lawyer.

It is impossible to estimate the comfort these time-saving machines are to the profession. For this reason, if for no other, we trust that both Mr. Wicksteed and Mr. Ewart will, as they ought to, reap a substantial harvest from their labours.

## FLOTSAM AND JETSAM.

A Bill has been introduced in the Virginia Senate (which is the case every session), to repeal the law providing for the punishment of citizens of the commonwealth by stripes.

The House Committee of the U. S. Senate have before them the impeachment cases of four Judges: Durell of Louisiana, Busteed of Alabama, Story of Arkansas, and Duvall of Texas.

Lord St. Leonards, the only ex-Chancellor who held successively the Lord Chancellorship of Ireland and England, has reached his ninety-fourth year. He is still in the full possession of his faculties.

In a case before the Master of the Rolls, lately, Mr. Bagshawe, Q.C., referred to a licensed victualler, who had been called as a witness, as "this gentleman." "How long is it since publicans have gained the title of 'gentleman'?" asked his Honour; "since the last general election, I suppose?"

A conversation at the York Assizes—Junior Counsel (cross-examining a polite and venerable witness). "Come, now, was the carpet on the room old or new?" Polite and venerable witness—"Quite new, Sir." J. C. "Come, now, how do you know that?" P. and V. W. "Because it was bright and fresh-looking—like you, Sir!" (Jury giggle—Judge wrestles with a smile—Spectators roar—and Junior Counsel wishes he had gone into a bank.)

One can hardly appreciate the "mixed emotions" with which the counsel in a certain important case listened to the following dialogue, between the Judge and Foreman of the Jury, at the close of the Judge's charge:—

Judge—"Is there any point on which the Jury would like further explanation?"

Foreman—"There are two terms of *law* that have been a good deal used during this trial that I should like to know the meaning of—they are *plaintiff* and *defendant*."

It is not long since we listened to a conversation equally refreshing. A patient and careful Judge, having laboured for half-an-hour to explain a difficult contract to the jury, asks: "Now, if I were to send you to your room, do you think you would understand the matters you have to decide?"

Foreman (promptly)—"We think not, my Lord!"

Counsel will take singularly different views of the virtues of witnesses. Dr. Kenealy, with his command of high-sounding epithets, speaks of Bogle, the old Tichborne retainer, as—"one of those negroes described in Paul and Virginia, a man from whose countenance the light of truth beamed." Mr. Hawkins is blind to the 'beams of truth,' and calls this interesting African a "murky satellite." Miss Braine, the governess, who was positive that the defendant, whom she compassionately visited in sickness, is the Sir Roger whom she saw once in 1850, appeared to Dr. Kenealy in the light of a "ministering angel." "If Miss Braine be a ministering angel," exclaims Mr. Hawkins, "God preserve me from ministering angels! If I was to give her a character, I should say that she was all that is execrable and hateful." Captain Brown, whose otherwise spotless reputation is somewhat tarnished by his affectionate recognition of Jean Luie as an old comrade of the Osprey, is from the defendant's point of view "the gallant Captain Brown of the Brazilian Navy." Mr. Hawkins prefers to describe him as "the perjured proprietor of a pudding shop."

## LAW SOCIETY—MICHAELMAS TERM, 1873.

**LAW SOCIETY OF UPPER CANADA.**

OSCEODES HALL, HILARY TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

- No. 1276. ROBERT HAMILTON DENNISTOWN.  
 " 1277. JOHN HENRY METCALF.  
 " 1278. J. HOWATT BELL.  
 " 1279. WILLIAM DRUMMOND HOOG.  
 " 1280. KENNETH MCLEAN.  
 " 1281. EDWARD MEEK.  
 " 1282. EDWARD HARRY D. HALL.  
 " 1283. WILLIAM McDONNELL, JR.  
 " 1284. E. BURRITT EDWARDS.  
 " 1285. A. ELWOOD RICHARDS.  
 " 1286. HENRY ARTHUR REESOR.

The above named gentlemen were called in the order in which they entered the Society as Students, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

- WILLIAM DRUMMOND HOOG.  
 HENRY ARTHUR REESOR.  
 WILLIAM G. MURDOCH.  
 J. HOWATT BELL.  
 E. BURRITT EDWARDS.  
 WILLIAM McDONNELL, JR.  
 ALBERT EDWARD RICHARDS.  
 FRANK D. MOORE.  
 EDWARD MEEK.  
 ARCHIBALD MCKINNON.  
 GEORGE M. ROGER.  
 MORTIMER A. BALL.  
 JOHN MACGREGOR.

And on Tuesday, the 3rd February, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

- EDWARD POOLE.  
 ANCUS MARTIUS PETERSON.  
 WILLIAM MACBETH SUTHERLAND.  
 COLIN GEORGE SNIDER (as an Articled Clerk.)  
 LAFAYETTE ALEXANDER MCPHERSON.  
 HENRY PETER MILLIGAN.  
 FRANK NICHOLLS KENNIN.

*Junior Class.*

- WILLIAM BEATRATO.  
 WILLIAM LEIGH WALSH.  
 DAVID BURKE SIMPSON.  
 CHESTER GLASS.  
 THOMAS P. GALT.  
 WILLIAM H. BRET.  
 ALEXANDER H. LINTH.  
 FREDERICK CASE.  
 JOHN KELLEY DOWSELEY.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. I., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLIARD CAMERON,  
Treasurer.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR JUNE.

1. Mon..P. D., Q. B. N. T. D., C. P. Hon. Joseph Howe died, 1873. Hon. J. S. Macdonald died, 1872.
2. Tues..N. T. D., Q. B. P. D., C. P. Last d. for not. of trial, Co. Ct. Fenian skirmish at Lime-ridge, 1866.
3. Wed..Open Day, Q. B. New Trial Day, C. P.
4. Thurs.Open Day, Q. B. Open Day, C. P.
5. Fri....New Trial Day, Q. B. Open Day, C. P.
6. Sat....Open Day, Q. B. and C. P. Last day to give notice for Call.
7. SUN..1st Sunday after Trinity.
9. Tues..Charles Dickens died, 1870. Gen. Sees. and Co. Ct. sit. in each Co. beg. Last day for J. P.'s to ret. convictions to Clerk of Peace (32 V. Ont. c. 6, s. 9 (4); 32-33 V. c. 31, s. 76; 33 V. c. 27, s. 3.)
12. Sat....Last d. for Ct. of Rev. finally to rev. assen. rolls (32 V. c. 36, s. 59).
14. SUN..2nd Sunday after Trinity.
15. Mon..Magna Charta signed, 1215.
18. Thurs.Battle of Waterloo, 1815.
20. Sat....Accession of Queen Victoria, 1837. 38 Vict. begins.
21. SUN..3rd Sunday after Trinity. Longest day.
23. Tues..H. B. Co.'s territory transferred to Canada, 1870.
24. Wed....St. John the Baptist.
25. Thurs.Lord Dufferin landed at Quebec, 1872.
28. SUN..4th Sunday after Trinity.

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## THE

## Canada Law Journal.

Toronto, June, 1874.

The Hon. A. A. Dorion, Minister of Justice, has been appointed Chief Justice of the Queen's Bench in the Province of Quebec, in the room of Chief Justice Duval, resigned.

We are delighted at last to see a specimen sheet of the new Law and Equity Digest, by Mr. Christopher Robinson, Q.C., assisted by Mr. F. Joseph, which has just been issued by the publishers, Messrs. Rowsell & Hutchison. It is intended to issue it in monthly parts, containing from 100 to 120 pages each. The first to be issued this month. We trust the publishers will be able to fulfil their promise in this respect, though, considering the arrears of law reports to be got out by the same firm, it may be doubted. The new Digest will embrace all reports of the Superior Courts from the commencement, together with Practice, Chambers, and *Canada Law Journal Reports*.

We understand that the University of Trinity College has resolved to grant the degree of LL.B. to any Barrister of Ontario, who under the regulations of the Law School has had twelve months struck off his time, upon his producing a certificate to that effect. This may be looked upon as a high compliment to the efficiency of the Law School and the estimation in which it is held. We believe that graduates of other universities, which require a regular course of a more extended and complete nature before granting the degree, do not look upon this step with much favour. And although the Law School may very properly be looked upon as the place

## THE LAW SCHOOL—THE NEW JUDGES.

where the best legal education can be obtained, and where the examiners are from their skill and experience best fitted to test the knowledge of the student and to frame proper questions (a more difficult matter than the uninitiated suppose), there is much force in this, that the course of study at Osgoode Hall is purely of a practical character, whilst that of the universities is more wide-spread, embracing the civil law, international law, and a varied reading of a theoretical character.

*THE NEW JUDGES.*

Under the Act of the last session of the Ontario Legislature "to make further provision for the due administration of justice," the Court of Appeal is remodelled, and it will be necessary to appoint three additional Judges. We do not intend, at present, to discuss at any length the nature of the change that will be made by this Act, nor its uncertain wording and some omissions, but rather to speak of current rumours as to the appointments about to be made.

We regret exceedingly to hear that it is the intention to appoint as the three new Justices of the Court of Appeal, men other than the present Chiefs of the three Superior Courts of Law and Equity. We do not say that their claims have been overlooked, but it is manifestly absurd to suppose that they would give up their present position and take one which, though higher in some respects, would deprive them of a large percentage of the small pittance that has hitherto been thought sufficient for those on whom so much of the welfare of the people at large depends. The question of their precedence, also, under section 5 of the Act, is not very clear. It is impossible to say with certainty that they rank with the Chiefs of the Superior Courts, though it is thought that such was the intention.

We think that such arrangements as

to salary and otherwise should have been made that the three gentlemen we have referred to might have been the new Justices of Appeal. They have a large judicial experience and largely enjoy the confidence of the profession and the public, and their decisions would carry great weight. If it is a matter of promotion, they are undoubtedly entitled to it. It is not seemly, nor is it to the benefit of the "due administration of justice," that men, admitting them to be equally able and learned, should be taken from the Bar, or even from the present Bench, and placed in appeal from the judgments of those who have been for years their seniors, and rumour has it that both ranks will be drawn upon to fill the appellate chairs.

If the Chief Justice of Ontario were not, as he is, not only a sound and able lawyer, but also a man of superlatively strong practical common sense, intimately acquainted with the habits of the people and the nature and necessities of their business relations: if the Chief Justice of the Common Pleas were not, as he is, not merely a man of a high order of attainments and sparkling wit, but also a brilliant, well read and excellent lawyer: if the Chancellor had not, as he has proved he has, a remarkably sound judicial mind, combined with great industry and experience: and if they would not collectively, including of course the Chief of the Court of Appeal, form a very strong and satisfactory appellate court—we could understand some benefit to be gained by a course being taken which has the practical effect of passing them over; but we fail to see the wisdom of placing younger men, more fitted, from their natural vigour, for the toils of circuit work, in a position which, however well they may fill it, is more suitable for men at least equally capable and of ripened experience, and who, from their long and faithful service, are entitled to some relief from the more arduous portion of their

## THE CONSOLIDATION OF THE STATUTES.

duties. But whilst we take exception to the scheme which has brought about the result, we should show very little knowledge of the learning and ability of the Vice-Chancellor, who has just been gazetted as one of the Justices of Appeal, ("Senior Justice" it is said, whatever that may mean), if we deprecated his appointment, for we venture to assert, that high as he stood as a Judge of first instance, his reputation will be greater when his duties will be chiefly with matters of pure law. And if we are correctly informed as to the other gentleman who is to be taken from the present Bench, his appointment will be equally unexceptionable, and alike honourable to himself as to the appointing power. But notwithstanding this, we have no hesitation in saying that the profession and public would be best satisfied if a higher salary had been attached to the position of the Justices of Appeal, and if the three Chiefs had been placed in the appellate court.\*

### THE CONSOLIDATION OF THE STATUTES.

We are glad to hear that the work of consolidating the Statutes applicable to Ontario is under way. The consolidation of 1858-9 was entrusted to men of great experience, having amongst their number some of the highest legal talent of the

\* Since the above was written, and as we go to press, we hear that Mr. Justice Gwynne has declined to go into the Court of Appeal, on the terms of the *Gazette*, appointing Mr. V. C. Strong as "Senior Justice." We presume on the very intelligible ground that when the position was offered to him it was on the implied understanding that the order of precedence between himself and any other person who might be appointed should not be interfered with, and that the inversion of precedence was in fact a breach of faith on the part of the government, and contrary to established usage. The gentlemen from the Bar will probably be Mr. Burton, Q. C.; Mr. Proudfoot, Q. C.; and Mr. C. S. Paterson, Q. C.

country. The result was on the whole very satisfactory. A different plan is to be adopted on this occasion, and though doubts have been expressed as to the advisability of the course proposed by the Attorney General, we do not intend, as the plan has been settled, even if we desired to express any strong opinion against it, to say anything which could in any way create an unfavourable impression of that which should and will be judged solely upon its merits, when the important work has been completed.

The preliminary work will be done by three junior Barristers, under the immediate and direct supervision of the Attorney-General, and we understand it is intended that all doubtful questions which may arise as to jurisdiction, construction, implied repeal, &c., will be referred to the judges, either from time to time during the progress of the work, or in bulk as soon as the consolidators have brought the new volume as near perfection as they can. Of course the obvious difficulty that presents itself is, whether the Attorney-General and the judges can find the time to devote to such an arduous and engrossing business, for to be of any use, they must not only be all agreed upon the scheme of consolidation, but must also be thoroughly familiar with the details of the preliminary work, in fact it would be desirable that they should follow it from the beginning to the end; this, however, would be manifestly impossible.

All this would seem to show, if there is any force in our objection, that the whole work should have been entrusted to persons of the same experience and calibre as those who had charge of the consolidation of 1858-9; but, on the supposition that the Attorney-General and the judges can give the necessary time to it, we see many advantages in the proposed plan.

It will be necessary in the first place, to lay down some general plan on which

## THE CONSOLIDATION OF THE STATUTES—LAW SOCIETY.

the Statutes are to be consolidated, and it is perhaps right that the duty and responsibility of determining this should be assumed by the Attorney-General. There is a good deal of difference of opinion amongst the profession upon several points. One prominent one we may mention: whether the present language, with all its repetitions and redundancies, is to be adhered to, or an attempt made to simplify and improve the language of the Statutes. Even the bolder course of a codification is not without advocates. It will be a long work, and a work of great drudgery to "rough hew" the great body of the Statute Law of Ontario into anything like a symmetrical form; and it is well that men who can give their whole time to the work should be engaged in this operation. But the final work of preparing the body of consolidated laws to be submitted to the Legislature must be undertaken by the very best and ablest jurists in the country. This will be a practical necessity; for it is quite obvious that the consolidation, as finally prepared, must be accepted on *faith*. It would be absolutely impossible, without common consent, to pass any such measure in the ordinary way. There would be material for a discussion for years in such a work. If, then, the present is merely intended as preparing the ground, and it is intended finally to appoint two or three men of long experience, high standing and familiarity with the subject matter finally to prepare it for the Legislature, it is well, otherwise the work will be abortive.

The gentlemen who have been selected to do the preliminary work are said to be Messrs. F. Joseph, Langton, Biggar and Kingsford. The three latter are University honour men. Of Messrs. Langton and Biggar, having been on the staff of this journal, we can speak with confidence of, and with much pleasure testify to, their

ability and industry. Mr. Joseph has had some experience in the sort of work which he will have to do, and he is a careful and painstaking compiler; and if young men are to be chosen (and such is the fashion now-a-days, though some might like to see professional plums given to older men who have "borne the burden and heat of the day," and who also have time on their hands), we think the selection is a good one. The consolidation of 1858-9 will be a model for the new volume, and the learning and skill there displayed will be of the greatest value.

We wish the consolidators every success in their labours and shall be glad to congratulate all parties concerned upon a successful result. On a future occasion we shall refer more particularly to the nature of the work to be done.

## LAW SOCIETY.

## EASTER TERM—1874.

We are glad to see that the Hon. Mr. Justice Gwynne has returned from his recent trip to Europe, looking extremely well. He is taking Chambers and Practice Court this term, relieving Mr. Dalton for a time from his too arduous duties.

Business in both courts is unusually brisk, there being no less than sixty-five cases on the trial paper of the Queen's Bench, and thirty-three on that of the Common Pleas.

Thirteen gentlemen presented themselves for call to the Bar. Of these Mr. E. G. Patterson was the only one who succeeded in passing without an oral on the merits. He distanced all competitors, passing a most satisfactory examination. Messrs. C. E. Ryerson, G. E. Frazer, P. M. Barker, H. M. Deroche, J. E. Terhune, A. S. Ball, and F. D. Moore, were also admitted without an oral, having previously passed as attorneys. Four gentle-

## TRIBUNALS OF COMMERCE.

men were rejected. Mr. Gormully, being an English Barrister, was admitted to an *ad eundem* degree. Of those who competed in the examination for attorneys, Messrs. Gormully, G. E. Patterson, C. E. Ryerson, and T. H. McGuire passed without an oral on the merits, having obtained 75 per cent. Sixteen gentlemen presented themselves for this examination, of whom twelve passed. Amongst the candidates for admission to the Law Society, Messrs. Fitzgerald, Riordan, Fletcher, Campbell and Holmes, passed an exceedingly good examination, each obtaining more than four-fifths of the entire number of marks. Thirty-seven gentlemen presented themselves for admission, of whom five were rejected.

In the Law School examinations Messrs. Lawson, Evans, Bruce, and Ferguson, passed an examination entitling them to reduce their time of service under articles by eighteen months. Messrs. Hall, Cooke, O'Brien and Pearson had their time shortened by twelve months. Messrs. Wilson, Clendennan and Pearson, passed the Junior class examination.

## TRIBUNALS OF COMMERCE.

The third report of the Judicature Commission has been presented to the House of Parliament of Great Britain. It deals with the question "whether it would be for the public advantage to establish tribunals of commerce for the cognizance of disputes relating to commercial transactions, or to any and what classes of such transactions, and if so, in what manner and with what jurisdiction such tribunals ought to be constituted; and in what relations, if any, they ought to stand to the courts of ordinary jurisdiction?" To obtain the necessary information whereon to base a report, a series of questions were addressed to consuls, merchants, and members of the legal profession in foreign countries, as well as to mercantile men in England; and evi-

dence was also taken before a Committee of the House of Commons, and the answers received and the evidence are given in an appendix to the report.

It is more as a matter of interesting legal news, than from a conviction of any pressing necessity to ventilate the subject in this country, that we now refer to this matter. The establishment of such tribunals has, however, been discussed here, and the example of some continental countries not enjoying a larger commerce than ourselves adduced, but the matter can, we think, without any great detriment to the public interests, lie over until other matters of more practical importance are settled.

The conclusions arrived at by the Commissioners, or rather by the large majority of them (for Lord Penzance and Sir Sydney Waterlow give their reasons for not signing the report), we give in the words of the report:—

"We find that those by whom legislation on this subject has been promoted (although generally desiring that some provision should be made for more summary proceedings in many commercial cases), are not agreed as to the character of the Tribunals which they wish to establish, or the class of cases that should come within their cognizance. Indeed there is no unanimity of opinion as to whether the Judges should be wholly commercial, or partly commercial and partly legal; whether the commercial members of the Tribunals should be Judges having an equal voice in the decision, or assessors or advisers only to a legal Judge, who would in that case be the President of the Court; whether the commercial members should be paid or not paid for their services; whether the Tribunals should observe the ordinary rules of evidence, or be at liberty to admit anything as evidence which they may consider material to the point in issue; whether they should be guided by the principles laid down by the Superior Courts of Law, or decide irrespectively of precedent and according to their own views of what is just or proper in each particular case; whether the parties should be allowed to be represented by counsel or solicitors; whether there should be any appeal, and in what cases, and to what Courts. Upon all these points.



## TRIBUNALS OF COMMERCE.

there appears to be the greatest diversity of opinion.

We find moreover that, even in the countries in which Tribunals of Commerce are established, great diversity exists with regard to the constitution of these Courts. Thus, in France, in Belgium, and in some other countries, all the members of the Court are merchants, except the greffier or registrar, and he has technically no voice in the decision. On the other hand, in many of the German States, the Court is presided over by a lawyer. In Dantzic the Tribunal consists of a legal President, four other legal Judges, and four merchants, but the merchant Judges do not attend unless required. In Königsberg the commercial members have no vote, only a deliberative voice, the decision resting entirely with the legal members of the Court. In Prussia, generally, it is in contemplation to substitute a paid lawyer for an unpaid merchant as President. There is in fact no uniformity in the constitution of these Tribunals; in some countries the mercantile, in others the legal element prevails, sometimes in the latter case to the exclusion of the commercial altogether.

We also find that, where the Tribunal is composed entirely of mercantile Judges, assisted by a greffier who is a lawyer, the latter, although he has no vote, becomes of necessity the most important member of the Court; and thence arises this anomaly, that the person who virtually decides the case is not clothed with the responsibilities of a Judge.

Now, we think that it is of the utmost importance to the commercial community that the decisions of the Courts of Law should on all questions of principle be, as far as possible, uniform, thus affording precedents for the conduct of those engaged in the ordinary transactions of trade. With this view it is essential that the Judges by whom commercial cases are determined, should be guided by the recognized rules of law, and by the decisions of the Superior Courts in analogous cases; and only Judges who have been trained in the principles and practice of law can be expected to be so guided. We fear that merchants would be too apt to decide questions that might come before them (as some of the witnesses we examined have suggested that they should do) according to their own views of what was just and proper in the particular case, a course which, from the uncertainty attending their decisions, would inevitably multiply litigation, and with the vast and intricate commercial business of this country, would sooner or later lead to great

confusion. Commercial questions, we think, ought not to be determined without law, or by men without special legal training. For these reasons, we are of opinion that it is not expedient to establish in this country Tribunals of Commerce, in which commercial men are to be the Judges.

But while we are quite agreed that a Court presided over by mercantile men, or in which mercantile men have a deciding vote, would lead to confusion and uncertainty in the administration of the law, we are fully alive to the inconveniences that do undoubtedly arise from the want of adequate technical knowledge in the Court which has to adjudicate upon cases of a commercial character. We think there is ground for the complaint that cases are sometimes tried at Nisi Prius before a Judge and jury who have not the practical knowledge of the trade or business which is necessary for their proper determination. We are of opinion that many cases involving for their comprehension a technical or special knowledge, cannot be satisfactorily disposed of by the ordinary tribunal of a Judge and jury, and that the proper tribunal for such cases would be a Court presided over by a legal Judge, assisted by two skilled assessors, who could advise the Judge as to any technical or practical matters arising in the course of the inquiry, and who by their mere presence would frequently deter skilled witnesses from giving such professional evidence as is often a scandal to the administration of justice. This is the kind of assistance which we, in our first report to Your Majesty, contemplated should be given to the superior Judges on the trial of cases of a scientific or technical character; and which has been provided for by the Supreme Court of Judicature Act. If the recommendation for the enlargement of the jurisdiction of the County Courts, contained in our second Report, should be adopted by the Legislature, we think it would be expedient that similar assistance should be afforded in mercantile cases to the Judges of those Courts; and in this manner the principal advantages anticipated by the advocates of Tribunals of Commerce might, we think, be attained.

We are of opinion that there would be no practical difficulty in carrying such an arrangement into effect. We think that there might be for every place of sufficient importance a rota or a panel, to be formed from time to time, composed of merchants, shipowners, or others conversant with the trade and business of the district, or other competent persons, from which rota the Judge might, at the request of the

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parties, or, if he thought the circumstances of the case required it, at his discretion, select two persons who should sit with him, and advise him during the progress of the case on any point upon which their special knowledge would be of use. In special cases it might also be competent for the Judge to call in the assistance of assessors who are not upon the local rota. But we are strongly of opinion that these mercantile or scientific assessors should not have any voice in the decision, and that the whole responsibility of the decision should rest with the Judge.

We think that in cases in which an appeal is allowed there should be power for the Judge or Court to call in the assistance of like assessors.

Our opinion is that the assessors should be paid for their services in Court, but not receiving any other remuneration. We think that for moderate fees the services of gentlemen possessing sufficient knowledge and independence to afford the requisite assistance to the Judge could be obtained. Their fees should be costs in the cause.

These provisions, we venture to think, would supply the Judge with the requisite practical or technical knowledge to enable him to do justice between the parties. We hope that the Legislature will always provide sufficient judicial strength to obviate the great complaint as to delay, and that under the new judicial system, of which the Judicature Act is the first fruit, effectual rules will be established to meet the other great grievance of expense.

We hope soon to be in a position to lay before Your Majesty our further Report upon other matters included in our Commission, which have not been already disposed of."

Here follow the signatures of the Commissioners, commencing with Lord Selborne, followed by Lord Cairns, Lord Hatherley, Chief Justice Cockburn, &c.

Mr. Acton S. Ayrton expresses his individual views on some points as follows:

"In signing this Report, I am unable to concur in the reasons assigned for deeming it inexpedient to place the mercantile members on a footing of equality with the legal Judges of the Tribunals proposed to be invested with power to decide commercial cases. The argument that the uniform administration of the law would be impaired has, I believe, been usually urged against proposals for withdrawing causes from the Courts at Westminster, and remitting them to inferior Tribunals. It was suggested

that this evil would arise from the establishment of County Courts, and from the extension of their jurisdiction, but it is proved by experience that no such evil has arisen, nor does it arise from the exercise of the judicial functions of the Courts of Quarter Sessions or Petty Sessions, or the stipendiary or unpaid magistrates, although their decisions in criminal cases, and in certain civil cases, affect the rights and liabilities of the public in as great a degree as the decisions of Tribunals of Commerce would affect the commercial community.

It appears to me that when a dispute arises in the course of a commercial dealing, the compulsory settlement of it by a Tribunal may be regarded as only a continuance or a conclusion of the transaction, and that it is unreasonable to insist that the parties interested shall, as a condition of having their dispute determined, be required, at an enormous cost and inconvenience to themselves, to create a precedent for the benefit of society, and to add a rule of law to a commercial code.

I venture to think that it is not necessary to regard the decisions of particular cases as such precedents, but where parties desire, as now sometimes happens, that a rule of law should be established, regardless of the trouble and expense of litigation, there would be no difficulty in carrying the case from a Tribunal of Commerce to the Supreme Court of Justice for that purpose.

I consider that the advantages which would result from placing the legal and commercial elements of the Tribunal on an equality, outweigh the objections. The legal Judge could exercise sufficient influence over his commercial colleagues to prevent them from acting contrary to settled law, but the sagacity and experience of the commercial men would in general be of more service to the suitors in the decision of their disputes than the legal knowledge of the Judge.

The advantage of a Tribunal of Commerce does not, however, consist merely in the constitution of the Court, but it is in the mode of procedure. It seems desirable to have a guarded formal and somewhat tardy procedure through legal agents, where the judicial power is entrusted to a single State Judge, not only for the protection of the suitors against each other, but against any abuse of power on the part of the Judge. Nor does the ordinary litigation in these Courts require a more summary mode of procedure. But commercial disputes frequently demand a very speedy decision, as well as special treatment whilst under adjudication, such as those arising out of dealings relating to the

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loading and despatch of vessels, the sale and resale, the warehousing, transfer, and stoppage of goods, the transactions of agents, and of others involving several liabilities. Tribunals of Commerce, with the safeguard of mercantile members, are authorised to proceed in the most summary manner, to adapt their procedure to the exigencies of each particular case, and to require the personal attendance of the parties who have been engaged in the dealing to afford such explanations as may be requisite, instead of being obliged to wait in order to have every representation to the Court, it may be said, filtered, and perhaps mystified, through a single or even double legal agency.

It seems to me to be no sufficient answer to the request of the mercantile community, that Tribunals which have for so many years shown their usefulness abroad should be introduced into this country, to assert that individuals are not agreed upon the best mode of constituting such Tribunals, or of regulating their procedure. The Committee of the House of Commons, after considering a variety of opinions, arrived at conclusions indicating how Tribunals of Commerce might be established, and the Commission has in very material points concurred in those conclusions. It may, therefore, be hoped that a measure may be framed which will meet with general acquiescence."

The reasons of Lord Penzance and of Sir Sydney H. Waterlow for not signing the Report are given below in their own words:—

I have been unable to concur in this Report, because I am not satisfied that Tribunals might not be established consisting of commercial men with adequate legal assistance, capable of settling commercial disputes in a satisfactory manner, at greater speed, and at much less cost than at present. And I think the well-known fact that in the large majority of commercial disputes the parties avoid the Courts of Law and resort to private arbitration, is strong to show the need of some such Tribunals, and a cogent reason for making the experiment.—PENZANCE.

I am unable to agree in all the recommendations of this Report, and therefore do not sign it. I feel very strongly that in a great commercial country like England, Tribunals can and ought to be established where suitors might obtain a decision on their differences more promptly, and much less expensively than in the Superior Courts, as at present constituted and regulated.

Those who support the present system of trying mercantile disputes seem to regard them all as hostile litigation, and lose sight of the fact that in the majority of cases when differences arise between merchants or traders, both parties would rejoice to obtain a prompt settlement, by a legal tribunal duly constituted, and to continue their friendly commercial relations. The present system too frequently works a denial of justice, or inflicts on the suitor a long-pending worrying law-suit, the solicitors on either side pleading in their clients' interests every technical point, and thus engendering a bitterness which destroys all future confidence, and puts an end to further mercantile dealings.

It is essential that the procedure of our Mercantile Courts (whether called Tribunals of Commerce or by any other name) should be of the simplest and most summary character, similar to that of the Tribunals of Commerce in Hamburg or in France, or before Justices of the Peace in this country, as recommended by the Select Committee of the House of Commons in 1871.

The liberty of the subject is, perhaps, more jealously guarded in this country than property. If the summary jurisdiction conferred on Justices of the Peace in criminal cases, when exercised by gentlemen who are not lawyers, gives satisfaction, it can scarcely be doubted that a similar jurisdiction in civil cases would be equally acceptable.

SYDNEY H. WATERLOW.

## LAW COURTS IN OHIO.

[COMMUNICATED.]

It happened that the writer of this article and a legal friend found themselves lately in one of the largest and wealthiest cities in Ohio. We were strolling about the streets with that aimlessness of purpose, which belongs to sight-seers in a strange place; when we came upon a gloomy building, about which many other idlers were hanging, and which bore other unmistakeable signs of being a Court House. To a lawyer a law-court in a strange country has peculiar attractions. Most lawyers would be as eager to see Westminster Hall as Westminster Abbey, and an enforced stay in a western city might

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be made tolerable if a law-court were sitting. Moved, therefore, by true professional instincts, we entered the temple of justice, and made our way into a room where the Court of Common Pleas for the county was in session.

This Court of Common Pleas, as far as we could learn, corresponds to a County Court in this country, though it appeared to have somewhat higher jurisdiction. The Court Room was very much like any Court Room of our own, with one notable distinction. There were no seats for the public, whereas, in a land which is supposed to be "groaning under the yoke of an aristocratic tyranny," the people are encouraged to attend the courts, and watch the course of the law, and for that purpose provision is made for their comfort; these democrats, however, railed off the public in a narrow corner, which was guiltless of anything like a seat.

But if the comfort of the public was neglected, the jury were treated with great consideration. They were accommodated with chairs of most luxurious make, and were placed at a respectable distance from one another, so as to allow full opportunity for stretching the limbs. In this matter we are far behind our cousins. The hard and narrow boxes in which our jurymen undergo the torture of their office, would not be tolerated for an hour in the United States. There was a negro amongst the jury in question, but, to our regret, no ladies. The jurors appeared respectable and intelligent, and listened with praiseworthy attention to the laboured and learned argument which a tedious counsel was slowly unfolding to them. We were somewhat surprised at the nature of the address under which the jury were suffering. We knew that in some States the jury have deprived the judge of some of his functions, for instance the sentencing power, and it seemed possible

that here they had gone further still, and were judges of the law as well as the fact. The counsel did not seem to appeal to the jury for a simple decision on the facts. He cited for their benefit from various thick volumes in support of legal propositions, and very elementary ones too, and talked a good deal about the "*factum probandi*," "*experimentum crucis*," "*animus furandi*," and other matters which are not supposed to suggest the clearest ideas to the mind of the average jurymen. It occurred to us that if the jury were to form their own opinion as to the law, this learning would tend to their bewilderment. If they were to take the law from the judge, it was not complimentary to him to cite a cloud of authorities in support of the simplest principles. But the jury assumed a look which was intended to express the interest with which they followed the argument of the learned counsel, and indeed their serious and patient attention was beyond all praise. Our admiration was enhanced when we learned that the case (it was the trial of a citizen for burglary) had been going on all the day before: that counsel had already "made argument" three different times: that the prisoner's counsel was just winding up an address, the magnitude of which was obvious from the pile of manuscript in which it was transcribed, and to which constant reference was made, and that the State prosecutor and judge would follow at proportionate length. Great must be the endurance of the law-loving American! The long-suffering of the jurors was, however, made intelligible when we were told they were professionals. In other words, that they made a business of serving on juries, and thereby earned a competent livelihood. It was also darkly hinted that a suitor had facilities for retaining a jury, as well as a counsel—and a judge.

There was a judicial bench in the

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Court of Common Pleas, but at present it was unoccupied. An elderly gentleman was sitting on a cane-bottomed chair, facing the wrong way, and warming his back at the open fire. His chin was resting on the chair-back, and he was meditating profoundly. He occasionally rose, traversed the room, his hands in his pockets, and expectorated thoughtfully. This was the judge. To those accustomed to the English or Colonial judge, presiding in robes and white cravat, in frigid reserve upon the bench, distant and dignified, the unconstrained manners and graceful ease of this Republican magistrate would seem refreshing in the extreme.

The prisoner sat by his counsel at a small table, in front of the jury. We looked in vain for a dock. We are very harsh to accused persons in this respect. We have absolutely no respect for their feelings, and cruelly exhibit them to the gaze of their fellow-citizens, between two minions of the law, in durance vile, unmindful of the theory that every man is presumed to be innocent until he is proved guilty. They have more delicacy about these matters in the States.

There was another gentleman at this counsel's table who attracted observation. His chair was tilted back against a pillar; his feet rested on the back of another chair before him. He was so placed that the judge was seated directly opposite him, and, was forced to contemplate the soles of his boots. This gentleman was dressed in the seediest apparel: he picked his teeth with a pen-knife: he expectorated continuously: he was lean and sal-low: he looked like a clock-peddler: he was in outward appearance one of Dickens' typical Yankees. We thought he might be a crier of the court or a personal friend of the burglar. What was our surprise when, on the defendant's counsel drawing his tedious oration to a close, he lowered his feet from their ele-

vation, brought his chair to the horizontal, and rose with the obvious intention of haranguing the jury. He was, in truth, the State Prosecutor.

He first took from the table a dirk, which, with other murderous and damning articles, had been found upon the prisoner. He examined it deliberately, felt its edge, held it up for the jury to observe, and commenced his address with the calmness and self-possession of the practised speaker.

The opening of his speech was almost word for word as follows: "You have heard tell, gentlemen of the jury, of the Gordian knot. Alexander, gentlemen, Alexander the Great, wanted to untie that Gordian knot, but he could not do it, nohow. So what did he do? He just whipped out his sword and cut that knot right square through. Now, gentlemen, we have a Gordian knot to untie, and a tough one too. But I won't trouble you to untie it. I'll just slither it, right clean through, with this dagger. You have likely seen instruments of this sort before. They are only found on two classes of men—Texan Rangers and Italians; and when you find one of these on a man, you know he's a *rascal* and a *scoundrel*, like this fellow here. I'll tell you what this dirk reminds me of. It reminds me of a cheese-taster. They just let it into a man, you know, and draw it out again, and see what sort of stuff he's made of. And I tell you, these fellows just whip out one of these articles and let it into a man as much quicker than they could draw a pistol and fire into him, as a streak of lightning is quicker 'n the growth of a tree. Now it does just make me sick to see a man toil and labour in defence of a scoundrel like this burglar here, the way my friend Wilson has laboured for his client. His effort was splendid: it was desperate: it was noble: and while his labours, his moral courage, and his fearlessness challenge

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my admiration and command my eulogy, I say it does make me sick to see such noble efforts thrown away on such a rascal as this."

Here a certain irreverence in our manner and a disposition to laugh attracted the notice of an official of the Court, who was eating an apple with a pocket-knife, which had evidently cut a good deal of tobacco. We thought it well to retire before we had compromised our character by laughing in the face of justice, and make it necessary for her myrmidon to expel us from her presence. We left highly gratified with our entertainment, and reproduce the incident for the information of an admiring profession in this benighted Northern clime, vouching for its strict accuracy in every particular. \*

## SELECTIONS.

## IMPRISONMENT FOR DEBT IN COUNTY COURTS.

Mr. Bass' Bill for abolishing imprisonment for debt in the County Courts has been defeated by an overwhelming majority, but there is sufficient strength of opinion in support of its principle to justify the expectation that imprisonment as a punishment for not paying debts will be abolished altogether at no distant date. When we find converts such as Sir Henry James, who was on a committee which took evidence on the subject, there must be some very strong and cogent objections to the present system. If we fail to ap-

We think our correspondent must have fallen on a bad specimen of the courts in Ohio. However that may be, the courts in Pennsylvania, Maryland and the Northern Atlantic States are certainly not conducted in the way our correspondent describes. We have at various times been in the courts in most of these States and found the business conducted not only with ability, but with dignity and decorum.

In some of the States in the Union the judges still retain the gown—and in the highest court in the land, the Supreme Court, the judges never appear in court without it.—Eps. L. J.

preciate them the fault must be ours. But whatever they are, and whatever their force, we consider that a mistake is made in mixing up with the simple issue "grave social and economical questions," which, according to Sir Henry James, are involved. We look through his speech to discover such questions, and what do we find? First, that the power to enforce payment by imprisonment fosters an unhealthy system of credit. Secondly, that the opportunity of obtaining credit for necessities induces the working man to get in debt to the draper and grocer whilst he spends his cash at the publican's, who cannot now recover for beer scores. Again, he says that men sent to prison are brought into contact with the worst characters. These, we suppose, are the grave social and economical questions, and we are free to admit that opinions may differ as to their gravity. We have heard them urged before, and they are supported by the testimony of one or two of the most eminent of our County Court Judges. Perhaps the difference of opinion prevailing among County Court Judges is the most remarkable circumstance in the history of the agitation. Mr. George Russell and Mr. J. A. Russell are gentlemen held in high esteem, and would not be likely to give opinions of a vague or ill-founded character. Forming their opinions upon their experience, they conclude that many of the small debts for which commitment orders are now made would never have been incurred if the power to enforce payment by imprisonment had not existed. That is to say, that if imprisonment for debt were abolished, the credit system as available to the working classes would collapse. And this they consider expedient. Many Judges, on the other hand, take a diametrically opposite view; they see no objection to the credit system properly regulated, or to the commitment of debtors with whose knowledge debts have been contracted, and who have the means to pay. Perhaps Mr. Commissioner Kerr has had as large experience of the credit system as any Judge, and the operation of imprisonment for debt has been constantly before him for many years. It is only necessary to sit in his court for a few hours to hear his opinion of the expediency of abolishing the power of imprisonment for non-payment of debts. The view which he takes is probably

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stronger than that of many County Court Judges, as he looks upon a man who has voluntarily got into debt, and refuses to pay, as *prima facie* dishonest. This is, we conceive, the correct view, and if imprisonment for non-payment of debts, or, more correctly, for disobeying an order of the Court for payment, were abolished, Mr. Cross' suggestion that the principle of the legislation against fraudulent debtors should be extended, would have to be adopted.

It is a favourite argument against imprisonment for debt, that it is punishing criminally the incapacity or refusal to perform a civil contract. For the purpose of promoting healthy trade, we question whether this is the right way of looking at the matter. To procure on credit goods for which we have not the means to pay is virtually obtaining them by false pretences, and a false pretence is punishable by imprisonment. We freely admit, on the other hand, that where the debtor is not the author of his own liability—where, for example, the goods have been ordered without his knowledge, and the first demand for payment comes in the form of a County Court summons, the hardship of imprisonment may be very great. We also admit that every precaution should be taken that a debtor should be informed personally of the intended proceedings before matters are put in train for commitment. Here, indeed, we arrive at the true grievance, and Mr. Cross deserves the greatest credit for being the only participator in the debate with sufficient sagacity or insight to perceive that it is in the administration of the law, and not in the law itself, that the evil is to be found. "If," he said, County Court Judges would confer together and frame rules by which to act in a more uniform manner, much of the alleged evil would be removed." It is certainly extraordinary that there has not been more concerted action amongst those gentlemen with a view to settling the practice. Strict proof should always be required that the original summons has reached the debtor before a judgment summons is granted, and particular care should be taken to ascertain that the goods were supplied with the knowledge or consent of the debtor. Some Judges have acted up to the extreme limit of *Jolly v. Rees* in relieving a husband from liability for goods supplied contrary to his orders.

The liability being gone there is an end of all difficulty, but if the liability cannot be got rid of it is in the next place important that the debtor who has to bear a burden innocently contracted, so far as he is concerned should not be sent to prison for non-payment, as the element of fraudulent intent or conduct is altogether wanting.

The whole subject has now at any rate been thoroughly thought out. It is very improbable that we shall obtain any better evidence than that which was extracted by the select committee. We know the opinion of County Court Judges, and we think it is the fact that a considerable majority are of opinion that the restricted power of imprisonment which now exists is most salutary, and should be preserved. We know that many Judges regret that abolition of imprisonment for debt has gone the length it has, and would gladly see it restored, whilst the commercial community must feel that it has considerably altered their relations with the public. This doubtless raises the question whether legislation should impose difficulties on trade by rendering debts impossible of recovery. We are decidedly of opinion that it should not, and we think that Sir Henry James' grave social and economical questions should not be taken into consideration in deliberating upon the operation of our legal machinery. There is ample evidence that impending imprisonment forces the settlement of claims which otherwise would be absolutely ignored in a very large number of cases. The few cases of hardship of which we hear are hardly a satisfactory set-off against such a result, and we conceive that debtor and creditor should be left to the difficulties and perils which each at present incurs; and even on a balance of disadvantages, we believe it would be more detrimental to a working man to be deprived of credit than to suffer occasional imprisonment. — *Law Times*.

## HUMOROUS PHASES OF THE LAW.

## HUMOROUS PHASES OF THE LAW.

## TRADE-MARKS.

One of the most fertile subjects of conversation in the commercial world is the rascality of lawyers. To hear the unanimous opinion of tradesmen, one would infer that, among the latter, at least, there was no such thing as cheating one another; that such is the purity of the atmosphere of trade, that no merchant ever contrives to filch away another's customers, and that one's ownership of his own is universally respected. In spite of the bad odour in which we are held by the mercantile world, we do not remember of ever hearing ourselves accused of stealing one another's signs, or forging one another's handwriting, or resorting to any other mean device to get business that does not belong to us. We fear that so much cannot be said of our critics. Here is an entire branch of the law devoted to the subject of the protection of merchants against the piracy of their fellows. One merchant imitates the peculiar commodity or invention of another; the law says he must not do this, and gives the latter the privilege of affixing a peculiar mark upon it to denote his proprietorship; the other then steals the mark, too, and the law then punishes the latter infraction. All this not only furnishes inevitable employment to those unprincipled lawyers, of whom we started out to speak, but gives rise to a vast amount of metaphysical and abstruse law learning. Out of this we propose to extract any alleviating phases of humour that may not be altogether patent, although the subject of investigation may be.

The poets have differed in their estimates of the importance of a name. One asks, "What's in a name? that which we call a rose by any other name would smell as sweet;" and another talks about "the magic of a name." But the experience of practical men has demonstrated that Campbell is right. The success of a book, a play, a commodity, is very dependent upon its name, and the success of men themselves is frequently hindered by a ridiculous or common-place name. The only man with a common name who achieved fame, according to our recollection, was John Brown, and even he would not, had it not been for the fortunate

circumstances of his failing in his enterprise and being hanged. The modern novelists have recognized "the magic of a name," and have named their offspring in a way to excite curiosity and surmise. Frequently their productions are named without any regard to appropriateness. Thus, "Cometh up as a Flower," so suggestive of the frailty of human existence, and which has accordingly been bought by all the pious persons in the land, turns out to be a very nasty tale of attempted seduction. "Ruskin on Types," it is said, was once inquired for by a printer, and John Hill Burton tells a story of a sheep-breeder who went to a hardware store to buy a "hydraulic ram" for the improvement of his flock. But we are straying from our subject.

It was formerly said that a trade-mark, to be entitled to judicial protection, must in itself indicate the origin or ownership of the article to which it belongs. This idea has been very materially modified by modern decisions. The rule is well stated by Lord Langdale in *Perry v. Truefitt*, 6 Beav. 56: "A man may mark his own manufacture, either by his name or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a peculiar person, no other trader has a right to stamp it upon his goods of a similar description." As an illustration, the words "Congress water" do not indicate either origin or ownership, for the water is a natural product, and no one would, for a moment, conceive our members of Congress as having any interest in such a subject; and yet the phrase has been held a valid trade-mark. So much the law concedes to a natural beverage described by a "fancy name." But artificial beverages are viewed with less complacency, and "Schiedam Schnapps" may be made and sold by any one. So it was held in *Wolfe v. Burke*, 7 Lans. 151, and although Mr. Wolfe was the first to introduce this delicate article of alcoholic stimulant to the American palate, yet any one may keep the wolf from his door by manufacturing and vending it.

It is a well-settled principle that a colourable imitation of one's trade-mark or designation will be restrained by a court of equity. This received exempli-



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fication in the case of *Christy v. Murphy*, 12 How. 77. The plaintiff organized and established, in 1842, a band of performers of negro minstrelsy, and named it after himself, "Christy's Minstrels." He was the first who established this species of entertainment. When he commenced it he incurred some expenditure of time, labour, and money, and continued it successfully until 1854, when he suspended it and went to California. In his absence the defendants, most of whom had been employed by him in his band as performers for hire, assumed the style and name of "Christy's Minstrels." The plaintiff, desiring to re-instate his own band under that name, prayed an injunction against this conduct of the defendants, and it was granted. Judge Clerke, who gave the opinion of the court, and who seems a wise and merry Clerke, such as would have rejoiced the heart of Chaucer, utters some very sensible legal, hygienic and ethical observations. He says: "Man does not live by bread alone;" the complete enjoyment, even of his physical existence, does not depend upon mere food or raiment or other material substances, but upon the exercise of the various and numerous moral and mental faculties with which God has endowed us. It may be as necessary to laugh as to eat; and I am persuaded, if people *would eat less and laugh more*, that their moral as well as physical well-being would be materially improved. The gravest of poets sings:

"The love of pleasure is man's eldest born;  
Wisdom, her younger sister, though more grave,  
Was meant to minister, and not to mar  
Imperial pleasure, queen of human hearts."

And the judge concludes that the entertainment afforded by Mr. Christy deserves the protection of the court against fraudulent imitations, and that, in the use of his name, the defendants must "keep dark."

Can a picture become a trade-mark? It was doubted by the Supreme Court of California, in *Fulkinburgh v. Lucy*, 35 Cal. 52. Judge Sanderson, in that case, shows a keen sense of the humorous in his description of the picture in question. He says: "The plaintiff's label has a highly-coloured picture, representing a washing-room, with tubs, baskets, clothes-lines, &c. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with

arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing, and clouds of steam are gracefully rolling up from the tubs, and dispersing along the ceiling. In the back-ground is extended across the room a clothes-line, upon which are suspended stockings and other under-garments, which have evidently just been put to use in testing the cleansing properties of the plaintiff's washing powder. To the left of the washerwoman stands a lady in a yellow bonnet, red dress, green congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket, and in her left hand is held a red parasol; while the other hand, which is encased in a green glove, is gracefully extended toward the nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow and green clothes-basket, full of dirty linen, and a yellow and green soap packing-box, upon which are printed, in small capitals, the words, 'Standard Co.'s Soap.' Each wash-tub is supported by a four-legged stool—some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to colour, is in part of a yellowish green, and in part of a greenish red, while the walls are of a grayish blue. This is but an imperfect description of the picture with which the plaintiff's label is adorned. The design is good, for it is eminently suggestive of the plaintiff's goods." The judge has a good eye for colour, it seems, and might make himself very useful in writing descriptions for the religious newspapers, of the "chromos" which they are so much in the habit of offering as inducements to subscribers. But we have never seen why a picture may not be made as good a trade-mark as anything else under Lord Langdale's rule.

However this may be, it would doubtless be conceded that an artist's or engraver's device placed upon a picture by way of trade-mark, would be protected against imitation. Thus, the letters A. D., in the form of a monogram, the well-known device of Albert Durer, could not lawfully be adopted by another engraver of a different name, although he should place after the letters the year of grace in

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which the work was produced, thus giving to the letters, when accurately viewed, the force simply of "*Anno Domini*." And this is the extent to which a man can make a trade-mark of his own name. Those of a different name may be restrained from assuming his name and mark, and others of the same name from imitating his peculiar device.

One accurate observer has seemed to think that trade-marks on pictures to denote their subjects are very useful. Mark Twain, in "*Innocents Abroad*," after explaining how he is able to recognize pictures of St. Mark, St. Matthew, and St. Sebastian, by the presence of the lion, the book and the pen, and the arrows, respectively, goes on to remark: "When we see other monks, looking tranquilly up to heaven, but having no trade-mark, we always ask who those parties are."

It is also a familiar principle that equity will not lend its aid to restrain imitations of articles which are themselves deceptive and false in their appellations. Thus, in *Fetridge v. Wells*, 13 How. 385, where the plaintiff made a liquid soap, composed of palm oil, potash, alcohol and sugar, and called it "Balm of Thousand Flowers," he was denied an injunction to restrain the defendant from doing the same thing. In other words, although the plaintiff came into court with so much soap, he did not come with "clean hands." We have seldom seen a case exhibiting a judge in such a prosaic and unimaginative light as this. Judge Duer actually denied an injunction, on the ground that the title of the plaintiff's soap was false and fraudulent, and induced the public to believe that it was concocted of many flowers! He satirically calls the article a "precious compound," and spends several pages in the severest judicial denunciation of its inventor. He quotes Webster and Johnson to show that "balm" means "an aromatic vegetable juice, whether extracted from trees, shrubs or flowers." What he would do to one who should call a soap "Balm of Gilead," does not appear. But, however matter-of-fact the judge was as to the title, he was sound when he came to criticise the paper of directions, which promised that the preparation would cure nearly every ill that flesh is heir to; and not even the "ingenious

pleasantry" of "the able counsel for the plaintiff, to whom he always listened with pleasure, and not unfrequently with instruction;" nor his own concession that "it would be difficult for a judge of the most approved and habitual gravity to read this paper of directions without a smile;" nor his own pleasantry, that "if would seem that so long as the 'Balm of Thousand Flowers' may be procured, it will be a folly to grow old and mistake to die," could cause him to forget his duty to refuse to aid the plaintiff in obtaining a monopoly to deceive the public. To show how doctors will disagree, we may cite the opinion of another judge of the same court upon a similar application, in respect to the very same article. Judge Hoffman could see no great harm in the title of the article, and said, "If a man should compound tallow with some high scent and beautiful colouring matter, and term it the 'Ointment of Immortality,' he has a right to appropriate so much of public credulity as he can by this designation." He also remarked that, the further removed an appellation is from an accurate description of the article, the more decided and exclusive becomes the right to it. He cited the cases of the "Medicated Mexican Balm," which had nothing in its composition peculiar to the land of Montezuma, and the "Chinese Liniment," which was an utter stranger to the celestial empire. (See *Fetridge v. Merchant*, 4 Abb. 156). Mr. Brown, in his original and ingenious treatise on trade-marks, takes similar ground. He says: "We are not deceived into thinking that there is any 'gold dust' in the whiskey that bears that name; or that an illuminating oil is verily 'mineral sperm oil;' or that pills are really 'Everlasting.'" We are quite inclined to agree with the latter authorities, and to believe that the public are not quite so credulous as Judge Duer seems to think. At all events, we think that Judge Sutherland lays down the true doctrine in *Comstock v. White*, 18 How. Pr. 421. "As to the public," he says, "if these pills are an innocent humbug, by which the parties are trying to make money, I doubt whether it is my duty, on these questions of property, of right and wrong between the parties, to step outside of the case, and to abridge the innocent individual liberty which all persons must be presumed to have in common; of suffering

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themselves to be humbugged." A doctrine previously enunciated in substance by Butler:

"Doubtless the pleasure is great  
Of being cheated, as to cheat."

And by *The Spectator*: "There is hardly a man in the world, one would think, so ignorant, as not to know that the ordinary quack doctors, who publish their great abilities in little brown billets, distributed to all who pass by, are, to a man, impostors and murderers; yet such is the credulity of the vulgar, and the impudence of those professors, that the affair still goes on, and new promises of what was never done before are made every day."

The principle of *Fetridge v. Wells* was less dubiously illustrated in *Hobbs v. Francois*, 19 How. 567. The plaintiff manufactured a cosmetic powder called "Meen Fun," and represented on his labels that it was "patronized by Her Majesty the Queen," and that the plaintiff's place of business was in London. It appearing that the article was really manufactured in New York, a motion for an injunction against the defendant's manufacture of a similar article, by the same name, was refused, the court remarking: "Her Majesty the Queen is probably ignorant of its virtues or even of its existence." And again, in *Fowle v. Spear*, 7 Penn. L. J. 176, the complainant applied for an injunction to restrain the defendant from using wrappers, labels and bottles resembling those used by him in his business of selling "Wistar's Balsam of Wild Cherry." It was claimed, by the complainant's wrappers, that his preparation was a specific for nearly every imaginable disease. This was too much for the court, who observed: "It is not the office of chancery to intervene, by its summary process, in controversies like this; '*non nostrum tantus componere*,' " which, being translated, we suppose must mean "it is not ours to decide about a nostrum."

*Curtis v. Bryan*, 36 How. 33, is an entertaining case in several particulars. Previous to 1844, Mrs. Charlotte N. Winslow prepared a composition for children teething, which she used with success. In that year she gave the receipt to her son-in-law, the plaintiff, who commenced its manufacture and sale under the name of "Mrs. Winslow's Sooth-

ing Syrup," and, with the approval of Mrs. W., he made that his trade-mark, and the article has achieved an extensive and valuable reputation under that appellation. In 1867, the defendant commenced the manufacture and sale of a preparation of similar appearance, put up in similar form, and denominated "Mrs. H. M. Winslow's Soothing Syrup for children teething." On the petition of the plaintiff, the defendant's conduct was enjoined, it appearing that his claim to any use of the name of "Winslow" was false and fraudulent. Long before the defendant commenced his manufacture, the original mother Winslow had passed to the silent tomb, but whether her passage thither had been, or might have been, in any way soothed by the administration of her own charmed mixture, the report does not show. The case is worthy of remark in several particulars. To begin, it shows the tender interest that the law takes in infants. The chancellor and courts of equity are the guardians of infants, and the jealous protectors of their rights. In this case, the court declared that its wards should not be imposed on by pseudo-Mrs. Winslows; that their slumbers should not be broken by any such fraudulent devices, and that the court having cut its own eye-teeth, would not allow the normal development of the infantile teeth to be interfered with by Mr. Bryan and his pretended Mrs. Winslow. Again, the case discloses the unexampled spectacle of a mother-in-law doing something handsome for her son-in-law, and finally we should note that, although Mother Winslow had gone, as is confidently hoped, where there is no "wailing or gnashing of teeth," yet the plaintiff continued to advertise that "Mrs. Winslow, an experienced nurse and female physician, presents to the attention of mothers her soothing syrup;" that the defendant claimed that this was a false representation, and that the court would not protect the plaintiff in a fraudulent monopoly of the name of the departed nurse; but that the court held that the objection was technical, that they would not look too intensely into tenses, and, the defendant being guilty of fraud, it did not lie in his mouth to make the objection. So Mother Winslow can rest in peace; her son-in-law can go on selling the mixture undisturbed, and thousands of young mothers, when they

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feel, like Hamlet, that the "heir bites shrewdly," will bless good Mother Winslow and good Judge Van Vorst. As for this wretched designing Bryan, he ought to be sentenced to read Judge Van Vorst's opinion of him. We would not like to be in his place for a considerable consideration. If he has any conscience at all, the feelings of the ruffians who smothered the babes in the tower, and of Macbeth, who "murdered sleep," must have been as nothing to his. The poet sweetly sings :

"Heaven lies about us in our infancy ;"

but, when we read this report, we must conclude that it is Bryan who *lies* about us in our infancy. Let the wretched man go. Not even the original and genuine Mother Winslow can purchase slumber for his guilty eyelids.

"Not poppy, nor mandragora,  
Nor all the drowsy syrups of the world  
Shall ever medicine thee to that sweet sleep  
Which thou owdest yesterday."

So much as to the action of courts in assisting poor human nature to get its teeth in without pain. Now, let us see how it will aid us in getting our teeth out without pain. *Colton v. Thomas*, 2 Brewster, 308, tells us how. The plaintiff alleged that he had purchased from Dr. G. Q. Colton the right to use the name "Colton Dental Association" in connection with the use of nitrous-oxide gas to alleviate pain in the extraction of teeth, and that he used the same in advertisements, and prominently displayed it on signs; that the defendant, who had been in his employment, left him, opened dental rooms in the same street, issued cards, announcing that he was "formerly operator at the Colton Dental Rooms," and extracted teeth without pain by the use of nitrous-oxide gas, and put a sign to the same purport over his door, but that the words "formerly operator at the," upon cards and sign, were in small and almost illegible letters, while the words "Colton Dental Rooms" were very conspicuous; the signs were very similar in shape, size, etc., and were hung on the same side of the street, in the same manner, and might readily be mistaken the one for the other, "especially by suffering patients impatient for relief." An injunction against the defendant's cards and signs was granted.

As we have seen, the imitation need not be literal to sustain an injunction. Thus, in *Burnett v. Phalon*, 9 Bosw. 192,

the plaintiff's "Cocaine" was held to be infringed by the defendant's "Cocaine;" and, in a French case, "Eau de la Floride" was held to be infringed by "Eau de la Fluoride." Here was a difference of only a single letter, but the court thought "the letter killeth."

But it is time to draw the moral from our subject. In the first place, we see that man is an imitative animal. Doubtless Mr. Darwin would derive comfort from the perusal of this paper, as affording evidence that we are all descended from Mr. Darwin's avowed ancestry. Be that as it may, the fact remains, man apes his fellow. Secondly: in the matter of trade-marks, in nine cases out of ten, the protection of the mark is sought for something not worth protecting or not needing protection. Nostrums form a large class, and things without which mankind would be as well off as with, or the thing infringed is no better than the spurious article; or the genuine is so much superior to the spurious article, that nobody will be deceived. So it is apparent that the protection extended is not for the public, but simply for individual benefit. Third: it is quite possible that if trade-marks were abolished all commodities would be improved, and less liable to adulteration or depreciation in manufacture. Mr. Wedgwood never patented his exquisite wares; he knew they could not be successfully imitated. Ulysses felt no uneasiness lest any one else should bend his bow. Wordsworth said to Lamb that Shakespeare was greatly overrated; "why," said he, "I could write just like him if I had a mind to." "Yes," replied Lamb, "if you only had the mind." There is quite a tempest in the literary tea-pot, about the authorship of "Beautiful Snow" and "Betsy and I are out," but "Paradise Lost" and "Hamlet" have had no imitators and need no trade-mark.—*Albany Law Journal*.

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HAMILTON ELECTION PETITION.

[Elec. Case.]

## CANADA REPORTS.

## ONTARIO.

## ELECTION CASES.

## RE HAMILTON ELECTION PETITION.

(Reported by Mr. H. J. SCOTT, B.A., Student-at-Law.)

*Recognizance—Petition against two members—Jurisdiction of Magistrate—Attorney as Surety.**Held*, 1. That upon a petition against two members, only the same security in amount need be given as upon a petition against one.

2. That the place where it was taken need not be shown on the face of the recognizance.

3. That a practising attorney may be a surety.

4. That a county magistrate can take the recognizance in a city which has a police magistrate, if within his county.

[March 25, 1874.—MR. DALTON].

In this case a summons was taken out to set aside the recognizance, petition and other proceedings, on the grounds that the recognizance was invalid, having been given for only \$1,000, whereas, as the petition was against two members, it should have been for \$2,000; that it was not duly acknowledged, not stating where it had been taken; that the magistrate who took it had no authority to do so, and that one of the sureties was a practising attorney, and thus incapacitated from being a surety.

*Davidson* shewed cause. This is a double application, being to set aside the petition, and also the recognizance; but they can not be both entertained at the same time, as 86 Vict., cap. 28, sec. 14, gives five days, after objections to the security are disposed of, to object to the petition. The recognizance is taken in the words of the form laid down by the Judges, and it is not necessary that the place where it was taken should appear on its face, if it was really taken where the magistrate had jurisdiction, and that this is the case is shown by an affidavit filed by the opposite party. If the objection is a valid one, being merely formal, leave ought to be given to amend, under the Administration of Justice Act. The question as to the jurisdiction of a magistrate, under sec. 308 of the Municipal Act of 1873, in towns or cities where a police magistrate has been appointed, is the same as that raised in the *West Northumberland Case*, and has been decided in favor of his jurisdiction. One of the sureties is a practising attorney, but the only authority for his not becoming a surety is a Rule of Court, which can only apply to that particular court, and the Act is quite silent as to this point. Under the English Act, which contains the same sections as ours, it has been

decided that on a petition against two members only one deposit need be made. *Pease v. Norwood* L. R., 4 C. P. 235. Should any of the objections be considered valid, a new recognizance has been since filed, and should be allowed to be substituted for the original one.

*J. K. Kerr*, contra.—Under 86 Vict. cap. 28, sec. 11, the bond must be given at the same time as the petition, and it is with that bond only that we have to do, no second one being allowed to be put in. *Pease v. Norwood*, by which it has been decided in England that, upon a petition against more than one member, only a single deposit need be made, is distinguishable from this. Although the sections of the Acts are the same, the judgment in that case is stated to be given in regard to the practice which had prevailed previous to the passing of the Act, which practice was different from that prevailing in Canada, prior to our Act, and the case cannot therefore be looked upon as an authority. In addition to the arguments used in the *West Northumberland Case*, as to the jurisdiction of magistrates, the course of legislation shews that the intention of Parliament was to do away wholly with their jurisdiction in places where police magistrates are appointed. Section 373 of the Municipal Act of 1866 only used the words "shall adjudicate in any case." Then came the Law Reform Act of 1868, which repealed this section, and employed much wider words in section 11, shewing an intention to still further restrict the magistrate's jurisdiction, which intention is kept alive by section 308, Municipal Act, 1873. As to one of the sureties being a practising attorney, the same reason which prohibits his being a surety in a case in the ordinary courts, operates and should have the same effect now.

MR. DALTON.—With regard to the point which affects one of the sureties in this case—that he cannot be bail because he is a practising attorney—I do not find any authority for disqualification on that ground. It is true that under the Rules of Court, and by long established practice under them, an attorney cannot be bail in an action in the Common Law Courts. But the sole foundation of this is a Rule of Court, which does, of course, prescribe the practice in the courts to which it applies. But it is mere practice; it never was intended to impose, nor could it impose, a general rule of law. It cannot, therefore, be applied without express enactment to the election court. An attorney also is good bail in criminal proceedings: *Petersdorf on Bail*, 511. As to the point which regards the amount of the security, that on a petition

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against two members the security should be for \$2,000 and not for \$1,000. I think shortly that *Pease v. Norwood* L. R. 4 C. P. 285, is conclusive against the objection.

The difficult and important question in the case is, whether a magistrate for the county of Wentworth can take the recognizance, under the Rules of the Election Court, in the city of Hamilton—there being a police magistrate in Hamilton?

The words of sec. 308 of the Municipal Act of 1873 are as follows:—"No other justice of the peace shall admit to bail, or discharge a prisoner, or adjudicate upon or otherwise act, in any case for any town or city where there is a police magistrate, except in the case of the illness, absence, or at the request, of the police magistrate."

This seems to be the only section now which takes away the power of the county justice to act in a town or city, within the boundaries of his county; and it is manifest from the terms of the section itself that the county justice continues to be a justice of the peace for the town or city which is within the county for all purposes, and to exercise all jurisdiction given by his commission, except in those matters forbidden by the words of the section. The commission in the city does not cease, and there is no prohibition of the exercise of authority under it in case of the illness or absence of the police magistrate, or when the police magistrate requests its exercise; and therefore the magistrate of the county of Wentworth here was commissioned as a justice of the peace for the city of Hamilton, in all matters within his commission, in which his authority is not expressly taken away by the 308th section.

It is important to observe this, because the authorities show that in such cases a very strict construction must be put upon words which restrain the powers of the commission.

It is said, in Paley on Convictions, pp. 30, 31, "The words of the commission, however, as well within liberties as without, are held to give the justices of the county jurisdiction in such boroughs and towns as are not counties of themselves, though they have a magistracy of their own, unless the charter by which they are constituted imports an express exclusion of the county magistrates, by a clause of *ne intromittant*." And again, "But the exclusion of the county magistrates has always been jealously regarded, and nothing but express words are deemed capable of having that effect. Therefore, where a borough had possessed an exclusive

jurisdiction under two successive charters containing *non intromittant* clauses, and a third charter vested the authority of justices of the peace in the mayor, bailiffs and burgesses *in tam amplis modis et consimilibus modo et forma pro ut preactea in eodem burgo institutum et consuetum fuit*, it was held, that notwithstanding such reference to the former charters, the county magistrates could not be excluded, inasmuch as their jurisdiction was not taken away by express terms." This is very distinct as to the manner in which the statute now in question must be looked at.

The exclusion, therefore, by the 308th section, can only be by the express words of the section, and cannot be carried further by intendment. The words are not general, but are applied to particular acts—they are not that no other justice than the police magistrate shall act in his capacity as justice for the town or city, unless in the excepted cases of illness, etc. This, had it been desired, it would have been easy to enact—it is not so said; but certain specified exercises of jurisdiction are forbidden, viz: admitting to bail, or discharging a prisoner, or adjudicating upon, or otherwise acting in any case, for any town or city, etc. What these words mean, and whether or not they extend to taking a recognizance under the Election Rules, may perhaps be made plainer by a history of this section.

In the Consolidated Municipal Act there are two clauses, which were the forerunners of the present. By section 365, it was enacted that justices for the county in which a city lies, should have no jurisdiction over offences committed in the city, and the warrants of county justices were required to be indorsed before being executed in a city, in the same manner as required by law, when to be executed in a separate county. Observe "*over offences committed in the city*," are the words, and by section 366, the power of the government was preserved to appoint any number of justices of the peace for a town, and to continue the jurisdiction of the justices of the county in which a town was situated, over offences committed in the town, except as to offences against the by-laws of the town, and penalties for refusing to accept office, or to make the declarations of office in the town, as to which jurisdiction should be exercised exclusively by the police magistrate, or mayor, or justice of the peace for the town.

These are the only clauses of this nature that are in the Consolidated Act, and it will be seen that so far, the exclusion was entirely of a local

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character. It was in this state of the law that *The Queen v. Row*, 14 U. C. C. P. 307, and *Hunt v. McArthur*, 24 U. C. Q. B. 254, were decided. This must be remembered, because the law on which they were founded has been altered.

The next Act is the 29 & 30 Vict. (1866). Section 360 is in the same language as section 365 of the Consolidated Act, with the addition that it authorizes any justice of the peace for the county to issue his warrant to try or investigate any case in a city, where the offence had been committed in the county, or union of counties, in which the city lay, or which it adjoined. This addition was no doubt occasioned by the decision in *The Queen v. Row*. Then section 373 enacted, that the recorder and police magistrate should be *ex officio* justices of the peace as well for the town or city as for the county in which they were situated, but that no other justice of the peace should adjudicate in any case, for any town or city where there was a police magistrate, except in the case of illness, etc.

By the Ontario Act 32 Vict., cap. 6, the above section 360 is altogether repealed. The office of recorder is abolished, and for the above section 373 is substituted a section in the words of the present section 308 of the Act of 1873.

I have gone into this somewhat tedious detail, to make manifest two results—at least as the effect appears to me. First, that there is now no distinction as respects the jurisdiction of county magistrates between a town and a city—all now depends upon section 308 of the Act of 1873, and the law upon which the *Queen v. Row* was decided is therefore changed. The question is now, not whether the locality is a town or city, but whether or not there is a police magistrate; and, secondly, that these sections, although in the later Acts more precise and cogent language is used than in the old ones, are still meant to enforce the same original idea—that the exclusion is altogether *local* in its character, and is meant to distinguish the jurisdiction of the county and city, or town magistrates as among themselves in respect of matters arising in the county, town or city. There is judicial decision to this effect. In *Regina v. Morton*, 19 U. C. C. P. 9. Hagarty, C. J., takes this view of the then existing clause; and Gwynne, J., says (p. 27): "But it is further contended that the provisions of sections 356, 360 and 367 to 373 inclusive, of 29 & 30 Vict. cap. 51, have the effect of prohibiting and restraining Mr. McMicken—although acting under 28 Vict.

cap. 20, from acting as a police magistrate in this matter within the city of Toronto, which has a police magistrate of its own. This contention rests upon no solid foundation, and it involves, in my judgment, a misconception of the object and intention of the sections referred to, the plain import of which, as their language unequivocally conveys, is to establish certain local courts having limited criminal jurisdiction, and to define the respective jurisdictions of the police magistrate of a city situated within a county, and of the justices of the peace of that county, in respect of offences committed within the city and county respectively. This is the sole object of the sections referred to. They have no application whatever to proceedings under the Extradition Treaty (which the matter then before the court concerned), which relates to offences committed in a foreign country."

This is to the very point. The taking of a recognizance in an election petition has no reference to any locality. It may be done in any county of the Province, and, therefore, there is no reason to suppose the act by a county magistrate, in a police town, forbidden by section 308.

There is very old and well-established law defining those acts which a justice may do out of his own county. It is to be found in "Bacon's Abridgment, Justices of the Peace," E. 5. It is there said, "As justices of the peace have no coercive power out of their county, they cannot make an order of bastardy or such like orders out of their county. But a justice of the peace, as we have already seen, may do a ministerial act out of the county, such as examine a party robbed, whether he knows the felons, according to the statute or not. Also by the better opinion, recognizances and informations voluntarily taken before them in any place are good, for those, says my Lord Chief Justice Hale, are acts of voluntary jurisdiction, and may be done out of the county, as a bishop may grant administration, institution or orders out of his diocese. But a Justice cannot imprison a person for not giving a recognizance, or commit a person for a crime, for these are acts of compulsory jurisdiction which he cannot exercise out of his proper county." 2 Hale, 51, 2 Hawkins, 47, are the authorities for this, and the distinction as to voluntary and coercive jurisdiction, is noticed in Paley on Convictions, p. 18, without any hint that it is not well founded. In *Petersdorf on Bail*, 511, it is said that recognizances voluntarily taken before justices out of their own county are valid.

Ch. Cham.]

NOTES OF CASES—BOUGHTON ET AL. V. KNIGHT ET AL.

[Eng. Rep.]

After all, is the taking of an election recognizance a judicial act? Admitting to bail is. But here there is no judgment to be exercised, everything is prescribed by the rules of the election court. At any rate, the last mentioned cases show that it is an act of that nature which cannot be within the prohibitions of section 308.

There is another point—that the place where the recognizance was taken is not shown on the face of it. This seems to be unnecessary, if in fact the taking of it was authorized. See the form in Petersdorf, and in Burns' Justice, and *Queen v. Sydeserf* 2 D. & L. 564. The fact that it was taken in Hamilton is supplied by the respondent himself. See *French v. Bellev* 1 M. & S. 302.

I refer further on the question of jurisdiction, to *Kerr v. Marquis of Ailsa*, 1 McQ. H. L.C. 736.

I discharge the summons, but, from the nature of the principal question, without costs.

*Order accordingly.*

## CHANCERY CHAMBERS.

### NOTES OF CASES.

#### PETERSON V. PETERSON.

*Interim alimony—Con. order 488.*

[April 20, 1874—*Strohn*, V. C., affirming the order of the *Referee*, April 4, 1874.]

An omission to make the endorsement directed by Con. Order 488, to be made upon the office copy of the Bill served, does not disentitle a plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion.

Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony, it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a *bona fide* intention to go to a hearing, and had made offers to change the venue with a view to enable the cause to be speedily heard.

#### WEISS V. CRAFTS.

*Vendor and purchaser—Execution of conveyance.*

[April 20, 1874.—The *Referee*.]

Under the fifth clause of the standing conditions of sale the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor's solicitor to procure its execution by all necessary parties.

The purchaser is not bound to pay the expenses of procuring the execution of the con-

veyance, unless there be an express condition to that effect.

Until the conveyance is completed and delivered to the purchaser, he may properly resist payment out of Court of any part of his purchase money.

#### WILSON V. WILSON.

*Security for costs—Order on *præcipe*.*

[April 27—*Strohn*, V. C., on appeal from the *Referee*.]

An order for security for costs can only be obtained on *præcipe* when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. Where a bill describes the plaintiff as of the City of Toronto, but stated that, "by the advice of a physician the plaintiff had sought change of air, and is now temporarily resident at Rochester," it was held that an order for security for costs could not properly be granted on *præcipe*.

#### DUNN V. McLEAN.

*Restoring dismissed bill.*

[May 18—*Strohn*, V. C., on appeal from the *Referee*.]

A bill dismissed for default of prosecution will not be restored unless it can be shewn that the plaintiff's cause of suit will be lost by the dismissal.

## ENGLISH REPORTS.

### COURT OF PROBATE.

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*Will—Testamentary capacity.*

Mental capacity is a question of degree, but the highest degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind: *Banks v. Goodfellow*, 22 L. T. Rep. N. S. 813; 5 L. Rep. Q. B. 549, considered.

[28 L. T. N. S. 562, June 21, 1873.]

John Knight, deceased, late of Henley Hall, in the county of Salop, died 7th Sept., 1872 aged sixty-nine, leaving a will, bearing date Jan 27th, 1869. This was propounded by the plaintiffs, Sir Charles Henry Rouse Boughton and Mr. Edward Marston, the executors, and it was opposed by the defendants, the three sons of the deceased, and the children of a deceased daughter, on the ground that the deceased, at the time of the execution of the will, was not of sound mind.

The testator was married in 1827, and shortly after his marriage removed to Brussels, where he resided until 1848. His wife died in 1842, and in 1853, on the death of his father, he



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came into possession of considerable landed property in Shropshire. At his death his personal estate was of the value of 62,000*l.*; his realty was of the value of 1500*l.* a year. The will was prepared by Mr. Marston, who was a solicitor at Ludlow, and who was recommended to him at his desire by Sir Charles Boughton. By the will the testator gave legacies of 8000*l.* to his son James, 7000*l.* to his son Charles, and a life interest in 10,000*l.* to his son John, 10,000*l.* to his brother Humphrey, 10,000*l.* to be divided between the daughters of his deceased brother Thomas, 1500*l.* to his sister, Mrs. Mansfield; 1000*l.* to each of his executors, and then smaller legacies, amounting together to 1300*l.* He appointed Sir Charles Boughton residuary legatee and devisee, and he also named him joint executor with Mr. Marston.

In support of the will the plaintiffs relied on the fact that the testator, who was admittedly of eccentric habits, and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it was alleged, that besides labouring under mental perversion in some other particulars, the deceased had conceived an insane aversion to his children, and that he was actuated by it to dispose of his property in the manner in which it was purported to be conveyed by the will.

Sir C. Boughton was a neighbour of the testator, and was on friendly, but not on intimate terms with him.

The case was tried before Sir J. Hannen and a special jury, and the trial extended over thirteen days in the month of March.

Serjt. *Perry* (with him *Day*, Q.C., and *Indervick*), for the plaintiffs.

Str *J. B. Karlake* (with him *Lloyd*, Q.C., Dr. *Swabey*, and *C. A. Middleton*), for the defendants.

In the course of his summing up to the jury, Sir JAMES HANNEN made the following observations:—The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will, on the 27th Jan., 1869, was of sound mind, memory and understanding. In one sense, the first phrase, "sound mind," covers the whole subject; but emphasis is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty.

Above all, there must be understanding, to comprehend their relations to himself, and their claims upon him. But, as I say, for convenience, the phrase "sound mind," may be adopted, and it is the one which I shall make use of throughout the rest of my observations. Now you will naturally expect from me, if not a definition, at least an explanation of what is the legal meaning of those words, "a sound mind;" and it will be my duty to give you such assistance as I am able, either from my own reflections upon the subject, or by the aid of what has been said by learned judges whose duty it has been to consider this important question before me. But I am afraid that, even with their aid, I can give you but little help, because, though their opinions may guide you a certain distance on the road you have to travel, yet where the real difficulty begins—if difficulty there be in this case—there you will have to find or make a way for yourselves. But I must commence, I think, by telling you what a "sound mind" does not mean. It does not mean a perfectly balanced mind. If it did, which of us would be competent to make a will? Such a mind would be free from the influence of prejudice, passion, and pride. But the law does not say a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, of frivolous, of mean, or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills, in a vast majority of cases, depends upon such nice and fine considerations that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every man is left free to make choice of the persons upon whom he will bestow his property after death, entirely unfettered as to the selection which he may think fit to make. He may wholly or partially disinherit his children, and leave his property to strangers, to gratify his spite, or to charities to gratify his pride; and we must respect, or rather I should say we must give effect to, his will, however much we may condemn the course which he has pursued. In this respect the law of England differs from the law of other countries. It is thought better to risk the chance of an abuse of the power arising, than altogether to deprive men of the power of making such selection as their knowledge of the characters, of the past his-

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tory and future prospects of their children or other relatives may demand ; and we must remember that we are here to administer the English law, and we must not attempt to correct its application in a particular case by knowingly deviating from it. I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quality of intellect which is requisite to constitute testamentary capacity. I desire particularly, now and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question—one in which the good sense of men of the world is called into action, and that it does not depend either upon scientific or legal definitions. It is a question of degree, which is to be solved in each particular case by those gentlemen who fulfil the office which you now have imposed upon you ; and I should like, for accuracy's sake, to quote the very words of Lord Cranworth, to which I referred in the observations which I had to make on a former occasion, and from which Sir John Karslake, in his opening speech, quoted a passage. In the case of *Boyse v. Rossborough* (6 H. of L. Cas. 4), in the House of Lords, Lord Cranworth made use of these words : "On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot, in saying that he is not a person capable of disposing of property ; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect—every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress and so on, must be disregarded. If a man has not contracted the ties of domestic life, or if, unhappily, they have been severed, a wide deviation from the ordinary type may be expected ; and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider departure from the ordinary type must be expected ; we must not easily assume that because a man indulges his humours in unaccustomed ways, that he is therefore of unsound mind. We must apply some

other test than this, of whether or not the man is very different from other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this—was the man laboring under delusions ? If he laboured under delusions, then to some extent his mind must be unsound. But though we have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, what is a delusion ? On this subject an eminent judge, who formerly sat in the court, the jurisdiction of which is now exercised here, has quoted with approbation a definition of delusion, which I will read to you. Sir John Nicoll, in the famous case of *Dew v. Clark* (1 Hagg. 11), as to which I shall have to say a word to you by-and-by, says :—"One of the counsel"—that counsel was Dr. Lushington, who afterwards had to consider similar questions—"accurately expressed it ; it is only the belief of facts which no rational person would have believed, that is insane delusion." Gentlemen, in one sense that is arguing in a circle ; for, in fact, it is only to say that that man is not rational who believes what no rational man would believe ; but for practical purposes it is a sufficient definition of a delusion, for this reason, that you must remember that the tribunal that is to determine the question, whether judge or jurymen, must of necessity take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense that you should say, I do not believe such and such a thing ; therefore the man who believes it is insane. Nay, more ; you must not say, I should not have believed such and such a thing ; therefore, the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it : Can I understand how any man in possession of his senses could have believed such and such a thing ? And if the answer you would have to give is, I cannot understand it ; then it is of the necessity of the case that you should say that that man is not sane. Sir John Nicoll, in a previous passage, has given what appears to me to be a more logical and precise definition of what a delusion is. He says :—"The true criterion is, where there is a delusion of mind there is insanity ; that is, when persons believe things to exist which exist only, or at least in a degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind." I believe you will find that

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that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Now, of course, there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experiences in this court. Take the case, which has been referred to, of Mrs. Thwaites. If a woman believes that she is one person of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question, no doubt, arises where the nature of the delusion which is said to exist is this, when it is alleged that a totally false, unfounded, unreasonable—because unreasoning—estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown, that parents—and I should say in justice to women, it is particularly the case rather with fathers than with mothers—that they may take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which you can feel that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a father exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them mischief or to deprive them of advantages which most men desire, above all things, to confer upon their children—I say there is a point at which, taken by itself, such repulsion and aversion becomes evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion, consisting solely of aversion to children, is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point. There are usually other aberrations of the mind which afford an index as to the character of the treatment of the children. Perhaps the nearest approach to a case in which there was nothing but dislike on the part of a parent to his child on which to proceed was the case of *Dow v. Clark (sup)*. There were indeed some minor things which were adverted to by the judge in giving his judgment, but he passes over these, as it was natural he should do, lightly; as for instance, there was in that case the fact that the gentleman who had practised medical electricity attached extraordinary importance to that means of cure in medical practice. He conceived that it

might be applied to every purpose, among the rest even to assisting of women in child-birth. But those were passed over, not indeed cast aside altogether, but passed over by the judge as not being the basis of his judgment. What he did rely on was, a long, persistent course of dislike of his only child, an only daughter, who, upon the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father no doubt entertained, so far as his nature would allow him, the warmest affection; but it broke out into these extraordinary forms, namely, he desired that that child's mind should be subject entirely to his own; that she should make her nature known to him, and confess her faults as, of course, a human being can only do to his Maker; and because his child did not fulfil his desires and hopes in that respect, he treated her as a reprobate, as an outcast. In her youth he treated her with great cruelty. He beat her; he used unaccustomed forms of punishment, and he continued throughout her life to treat her as though she were the worst, instead of, apparently, one of the best of women. In the end he left her indeed a sum of money sufficient to save her from actual want, if she had needed it, for she did not need it. She was well married to a person perfectly able to support her; and therefore, the argument might have been used in that case, that he was content to leave her to the fortune which she had secured by a happy marriage. He was not content to leave her so. He did leave her, as I say, a sum of money which would have been sufficient, in case of her husband falling into poverty, to save her from actual want; and, moreover, he left his property not to strangers—not to charities—but he left his property to two of his nephews. He was a man who throughout his life had presented to those who met him only in the ordinary way of business, or in the ordinary intercourse of life, the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals and learning all that could be learnt there, and he amassed a very large fortune—at least, a large fortune, considering what his commencement was—a fortune of some £25,000. or £30,000, by the practice of his profession. Yet, upon the ground which I have mentioned, that the dislike which he had conceived for this child reached such a point, that it could only be ascribed to mental unsoundness, that will so made in favour of the nephews was set aside, and the

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law was left to distribute his property without reference to his will. Now, I say usually you have the assistance of other things, besides the bare fact of a father conceiving a dislike for his child, by which to estimate whether that dislike was rational or irrational; and in this case, of course it has been contended that you have other criteria by which to judge of Mr. Knight's treatment of his children in his lifetime, and his treatment of them by his will after his death. You are entitled, indeed you are bound not to consider this case with reference to any particular act, or rather you are not to confine your attention to a particular act, namely, that of making the will. You are not to confine your attention to the particular time of making the will, but you are to consider Mr. Knight's life as a whole with the view of determining whether, in Jan. 1869, when he made that will, he was of sound mind. I shall take this opportunity of correcting an error, which you indeed would not be misled by, because you heard my words; but I observe that in the short-hand report of what I said in answer to an observation made by one of you gentlemen in the course of the cause, a mistake has been made, which it is right I should correct; because, of course, everything that falls from me has its weight, and I am responsible for my words to another court which can control me if I am wrong in the directions I give you. Therefore I beg to correct the words that have been put into my mouth, when I said that if a man be mad admittedly in 1870, and his conduct is the same in 1868 as it was in 1870, when he was, as we will assume, admittedly mad, you have the materials from which you may infer the condition of his mind in the interval. I have been reported to say, "from which you *must* infer the condition of his mind." That is of course what I did not say. Now, gentlemen, I think I can give you assistance by referring to what has been said on this subject in another department of the law. Some years ago the question of what amount of mental soundness was necessary in order to give rise to responsibility for crime was considered in the case of *MacNaghten*, who shot Mr. Drummond, under the impression that he was Sir Robert Peel, and the opinion of all the judges was taken upon the subject; and though the question is admittedly a somewhat different one in a criminal case to what it is here, yet I shall explain to you, presently, in what that difference consists; and there is, as you may easily see, an analogy which may be of use to us in considering the point now before us. There, Tindal, C. J., in expressing the opinion of all the judges (one of

them was a very eminent judge, who delivered an opinion of his own, but it did not in any way differ from the other judges), says:—"It must be proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Now that, in my opinion, affords as nearly as it is possible a general formula that is applicable to all cases in which this question arises, not exactly in those terms, but in the manner in which I am about to explain to you. It is essential to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very little degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act he is doing when he kills another; a very little degree of intelligence is sufficient to enable a man to know whether he is doing right or wrong when he puts an end to the life of another; and accordingly he is responsible for crime committed if he possesses that amount of intelligence. Take the other cases that have been suggested. Serjt. Parry, with the skill which characterises all that he does as an advocate, endeavored to alarm your mind, as it were, against taking a view hostile to him, by representing that if you come to the conclusion that Mr. Knight was of unsound mind in Jan. 1869, you undo all the important transactions of his life. In the first place, it is obvious that the same question which is now put to you on behalf of the plaintiff in this case would be put to any jury who had to determine the question with reference to any other act of his life, namely, whether at the time of the act done he was of sufficient capacity to understand the nature of the act he was doing. But in addition to that, take, for instance, the question of marriage. The question of marriage is always left in precisely the same terms as I have said to you it seems to me it should be left in almost every case. When the validity of the marriage is disputed on the ground that one or other of the parties was of unsound mind, the question is, was he or she capable of understanding the nature of the contract which he or she was entering into? So it would be with regard to contracts of buying or selling; and, to make use of an illustration—a very interesting one given us by the learned serjeant—take the case of the unhappy man who, being confined in a lunatic asylum, and with delusions in his

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mind, was called to give evidence. First of all the judge had to consider, was he capable of understanding the nature and character of the act that he was called upon to do when he swore to tell the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If he was, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things, responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. Because you will easily see it involves a larger and a wider survey of facts and things than any one of these matters to which I have called your attention. Every man, I suppose, must be conscious that in an inmost chamber of his mind there resides a power which makes use of the senses as its instruments, which makes use of all the other faculties. The senses minister to it in this manner: they bring, by their separate entrances, a knowledge of things and persons in the external world. The faculty of memory calls up pictures of things that are past; the imagination composes pictures and the fancy creates them, and all pass in review before this power, I care not what you call it, that criticises them and judges them, and it has moreover this quality which distinguishes it from every other faculty of the mind, the possession of which indeed distinguishes man from every other living thing, and makes it true in a certain sense that he is made in the image of God. It is this faculty, the faculty of judging himself; and, when that faculty is disordered, it may safely be said that his mind is unsound. Now I wish to call your attention to a case which has been frequently adverted to in the course of this cause. It is the case of *Banks v. Goodfellow*, a judgment of the Court of Queen's Bench, at a time when I had the honor of being a member of it. I was, therefore, a party to the judgment; but everybody, or rather I should say, all the members of the legal profession who hear me, will, of course, recognize the eloquent language of the great judge who presides over that court, the present Lord Chief Justice. But I was a party to the judgment, and, of course, while bound by it, I am bound by it only in the sense in which I understand its words. I think there can be no room for misconception as to their meaning, but I must explain to you the scope and bearing of it.

That was a case in which a man who had, indeed, been subject to delusions before and after he made his will, was not shown to be either under the influence of those delusions at the time, nor, on the other hand, was he shown to be so free from them that if he had been asked questions upon the subject he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for years and years, and to whom he had always expressed his intention of leaving his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, or it was his duty to take care of her after his death. It was left to the jury to say whether he made that will free from the influence of any of the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered, and it was held that, under those circumstances, the jury finding the fact in that way, that finding could not be set aside. I will not, of course, trouble you with reading the whole of the judgment, which, however, I may say, would well reward the trouble of reading it by laymen as well as by professional men, but I shall pick out passages to show you how carefully-guarded against misapprehension this decision is. I shall have occasion by-and-by to call your attention to instances in it which I think it has been sought to apply it incorrectly in the argument which has been addressed to you. Now, at one passage of the judgment, the Lord Chief Justice says this:—"No doubt, when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes sufficiently strong when the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded." But, in an earlier passage in the judgment, the Lord Chief Justice lays down with, I think I may say, singular accuracy, as well as beauty of language, what is essential to

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the constitution of testamentary capacity. Sir John Karalake anticipated me in many of the passages I should have read to you. I shall not read all he read, but I shall select this passage, as containing the very kernel and essence of the judgment:—"It is essential to the exercise of such a power" (that is the power of making a will), "that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted on. If the human instincts or affections, or the moral sense become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." I have no fear, when rightly understood, of that case being misapplied. [His Lordship then proceeded to consider the evidence in the case. Having done so at considerable length, he pointed out that while the witnesses called on behalf of the plaintiffs had few opportunities of meeting the deceased, and could only say that they had never seen anything odd or strange in his behaviour, the witnesses for the defence, who deposed to his insanity, were in constant association with him, and had therefore ample means of observing his true and inner life. The learned judge continued:—]—It is for you to say whether the accumulation of this evidence for the defendants has not this effect on your mind, that it leads you to the conclusion that whatever fluctuations there may have been in the condition of Mr. Knight's mind, for some years before he made that will he had been subject to delusions, and especially he had been subject to delusions with reference to the character, the intention, the motives of his own acts; and if you come to the conclusion that he was subject to these delusions, I beg to

particularly impress on your minds that it is the duty of the plaintiffs to satisfy you that at the time when the testator made that will he was free from those delusions, or free from their influence. The burden of proof, as it is called, is upon those who assert that the testator was of sound and disposing mind. In considering that question you cannot, I am sure, put aside the contents and the surrounding circumstances of that will. Then, on considering whether or not he was free from delusions as to the characters of his several sons whom he passed over in the disposition of his estate, though he left them sums of money out of his personalty, you cannot disregard the fact that he selected one having no natural claims upon him, of whom he knew little, and to whom he was under no obligations, which are usually recognised as the foundation on which to make a gift of this kind. That must be taken into your consideration in determining whether at the time he did this those prevailing delusions which I have referred to had passed away, or were utterly inoperative.

The jury found that at the time the will was executed the testator was not of sound mind.

## UNITED STATES REPORTS.

### DISTRICT COURT FOR DISTRICT OF CALIFORNIA.

IN RE JULIA LYONS.

*Bankruptcy—Married Women.*

In a state whose statute law makes a married woman living apart from her husband liable to be sued in all actions as if *sole*, she may be proceeded against under the bankrupt law.

[Jan. 29, 1874.]

HOFFMAN, J.—The question raised by the demurrer in this case, is whether the respondent, being a married woman, is liable on a contract to pay rent, and, if she has committed an act of bankruptcy, can be adjudged bankrupt. It appears that the husband of the respondent has long since renounced and abandoned all his marital rights and duties. For twelve years Mrs. Lyons has lived separate and apart from him, supporting herself and her minor children by her own exertions. In the course of her business as keeper of a lodging-house, she has contracted an indebtedness for rent, and being so indebted, and in contemplation of bankruptcy and insolvency, has made, as is alleged, an assignment of her property in fraud of the bankrupt act.

It is urged by the respondent's counsel that the contract of a married woman for the pay-

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ment of money is void, and that the petitioning creditor has no debt which the court can recognize. On this point numerous authorities are cited; but as they, for the most part, are decisions under the act of April 17, 1850, and the amended act of May 12, 1862, no examination of them is necessary. The decision of the question before us turns upon the force and effect to be given to the act of March 9, 1870. (Laws of 1870, p. 226.)

The first three sections of that act are as follows: Section 1. "The earnings of the wife shall not be liable for the debts of the husband." Section 2. "The earnings and accumulations of the wife and her minor children living with her, or being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife." Section 3. "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued without joining her husband, and may avail herself of, and be subject to, all legal process in all actions, including actions concerning her real estate." The fourth section prescribes the mode in which she may convey her real estate.

The object of these enactments is apparent. It was to secure to the wife, when abandoned by her husband, the fruits of her own industry, and to enable her to support herself and her children out of her earnings and accumulations, free from his interference or molestation. For this purpose her earnings and accumulations, which at common law belonged to her husband, are declared her separate property, and her rights in respect of such property are carefully defined. She is to have the sole and exclusive control of it; she may separately sue or be sued, and may avail herself of and be *subject to all legal process in all actions*. That the principal intention of the legislature was to protect deserted wives in their just rights, and not to impose upon them additional liabilities, is admitted. For this purpose they were placed in the position of *quasi femes sole*, and were granted all the powers necessary to enable them to earn their own livelihood, and to retain and enjoy the fruits of their industry. But to accomplish this object, it was evidently necessary to create new liabilities as well as to confer new rights. The ability to sue for moneys earned by or due to her was clearly indispensable to enable the wife to attain the object contemplated by the law.

Justice and reason, and even her own interests, demanded that she should herself be liable for all debts contracted by her. For without such

liability how could she obtain the credits usually necessary in the conduct of any business; and what could be said of the morality of a law which should announce to a woman that for all debts and demands due her she shall have the right to sue and enforce payment, but as to debts due by her she may plead her coverture as a conclusive bar to the action?

The separate property of a married woman has, on general principles of equity, been held liable for debts contracted in respect to it or in and about its management and improvement. The act of 1870 created a new species of separate property in the earnings and accumulations of the wife while separated from her husband.

The equitable principles already adopted by the courts, and usually enforced by statute, required this new species of separate property should be liable for debts incurred in its creation or management, and in the course of the business, the proceeds of which the statute enables the wife exclusively to enjoy. Further discussion, however, is needless, as the language of the act is too explicit to be mistaken. It enacts that the wife separated from the husband "may sue and be sued, and that she shall be subject to all legal process in all actions." This language is obviously inconsistent with any exemption from liability to suit for a just debt on the pretext that, being a married woman, her contracts for the payment of money are void.

The respondent being thus found to have incurred a valid indebtedness and a liability to be sued therefor as if a *feme sole*, she may, if she has committed an act of bankruptcy, be adjudged a bankrupt. Hillard on Bankruptcy, p. 49; Avery and Hobbs on Bankruptcy, pp. 33-4; *in re Kinkead*, 7 N. B. R., p. 439.

The demurrer is overruled and the respondent allowed ten days to answer the petition.—*Pacific Law Reporter*.\*

\* Whether a married woman may be proceeded against under the bankrupt act, would seem to depend, in each particular case, upon her power of making contracts, or of engaging in trade or other business independently of her husband. The general rule of the common law is that a married woman possesses no such power; but that if she enters into contracts or engages in trade or other business with her husband's consent or ratification, she acts simply as his agent; and hence that the fruits of such contracts, or the accumulations of such trade or business, belong to him and not to her. *Bish. Mar. Wom.*, s. 733; *Switzer v. Valentine*, 4 Duer, 96; *Jenkins v. Pinn*, 37 Ind., 349. Wherever this rule of the common law obtains in full force, it is clear that she cannot be adjudged a bankrupt. *In re Goodman*, 8 N. B. R., 890.

But this rule admits of exceptions, and these may be arranged into two classes: 1. Exceptions created by local custom or by local law. 2. Exceptions growing out of a temporary cessation of the coverture.

## U. S. Rep.]

## IN RE JULIA LYONS.

## [U. S. Rep.]

Under the first of these exceptions is the case of frequent occurrence in the English books, where a married woman acts as a *sole trader* according to the custom of London. *Ex parte Carrington*, 1 Atk., 306, *Lewis v. Phillips*, 8 Burr., 1776; S. O. 1 W., Black. Rep., 570. See also in Pennsylvania, *Burke v. Winkie*, 2 Serjt. and Rawle, 189; in South Carolina, *Newbiggin v. Pillans*, 2 Bay, 162; in Louisiana, *Christensen v. Stumpf*, 16 La. An., 50; *Spalding v. Godard*, 15 La. An., 227; *Bowles v. Turner*, 352 lb.; in California, *Melcher v. Culham*, 22 Cal., 522; *Abrams v. Howard*, 23 Cal., 388. Under the same head would fall those cases like *re Lyons*, *supra*, where by statute in particular states, a married woman may, under certain circumstances, contract liabilities, carry on business and sue and be sued independently of her husband, and as a *feme sole*. In these cases there would seem to be no doubt that she is amenable to the bankrupt law. As in New York: *In re O'Brien*, N. B. Sup., 33; *Graham v. Starks*, 3 N. B. R., 92. Or in Illinois: *In re Kinkadee*, 7 N. B. R., 489. Thus it was held, in the last case in the United States district court at Chicago, by BLODGETT, J., that where a husband and wife carried on a business in partnership, their status was such, under the statutes of Illinois relating to married women, that the *feme* might be proceeded against in bankruptcy; and hence that the partnership creditors were entitled to a preference in the distribution of the assets, over a creditor of the husband, whose demand had accrued prior to the organization of the firm. And it was intimated that the wife would be separately adjudicated a bankrupt if it should be found necessary in the course of the proceeding to do so, in order to reach any individual property she might have. In the case of *Re Rachel Goodman*, 8 N. B. R., 380, determined in the United States district court for Indiana, before CRISHAM, J., the principle above stated is fully recognised; but when applied with reference to the statutes of Indiana relating to married women, as interpreted by the supreme court of that state, the case resulted in a dismissal of the petition. It was found under the Indiana statutes, as expounded by the state supreme court, (1), that a married woman cannot engage in any kind of trade or business on her own account unless she have separate property; (2) that if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife; and (3), that a married woman in Indiana, possessed of no separate estate, is relieved of none of the disabilities imposed upon her by the common law. The petition failed to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, and it was held to follow that she could not be adjudged a bankrupt. So in the case of *Re Stichter*, 2 N. B. R., 107; in Minnesota, where the statute allows a married woman, under certain circumstances, to engage in trade in her own name, upon obtaining a license from a probate justice, in which case the business and profits become her separate property, and she is bound by her contracts as a *feme sole*, NICHOLSON, district judge, held that a married woman who had been engaged in business as a member of a partnership firm, but without complying with the statute, could avail herself of the plea of coverture to defeat the bankruptcy proceedings against her.

Under the second head, which embraces the question whether a married woman may be adjudged a bankrupt where the marriage relation has been temporarily interrupted, the books furnish many instructive decisions defining the circumstances under which, independently of local custom or statute, a married woman may be sepa-

ately sued. These decisions embrace cases where a married woman lives apart from her husband on a separate maintenance; in which case it has been held and afterwards denied, in England, that the wife may be sued at law as a *feme sole*. *Corbet v. Posnitz*, 1 Term R., 5. *Contra*, *Compton v. Collinson* 1 H. Blacks., 350; *Clayton v. Adams*, 6 Term R., 604; *Marshall v. Rutton*, 8 Term R., 545. And Chancellor KENT states (2 Com. 161) that the rule of *Corbet v. Posnitz* has never been adopted in this country. It has also been held in England that a wife may be sued at law whose husband is an absent alien enemy, and under an absolute disability of returning. *Derry v. Duchess of Mazarine*, 1 Ld. Raym., 147. Or where he has been transported. *Sparrow v. Carruthers*, 2 W. Black., 1197. Or had been banished or had abjured the realm. *Lady Belknap & Wayland*, 1 Co. Lit., 132 b, 133 a. So it has been held in Massachusetts that a married woman who had been divorced *a mensa et thoro* might sue and be sued as a *feme sole* in respect of property acquired or debts contracted by her subsequently to the divorce. *Dean v. Richmond*, 5 Pick., 461; *Pierce v. Burdick*, 4 Metc., 303. And it has been held in the same state that a *feme coeert*, whose husband had deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and for five years had lived in that commonwealth, the husband being a foreigner and having never been within the United States, was competent to sue and be sued as a *feme sole*. *Gregory v. Paul*, 15 Mass., 81. And the question is now said to be settled in Massachusetts, as a necessary exception to the rule of the common law, placing a married woman under a disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. "It is," said SHAW, Ch. J., "an application of an old rule of the common law, which took away the disability of coverture where the husband was exiled or had abjured the realm." *Gregory v. Pierce*, 4 Metc., 478. And within the meaning of this principle, the residence of the husband within another of the United States is held to be equivalent to his residence in a foreign state. *Abbot v. Bayley*, 6 Peck, 89. "But," said SHAW, Ch. J., in *Gregory v. Pierce*, *supra*, "to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm." In *Love v. Moynahan*, 16 Ill., 277, 282, the supreme court of Illinois, after reviewing many modern cases, hold the law to be, "that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition."

So it has been held in a recent case in Georgia, that, on general principles, a married woman whose husband has deserted her and resided in another state, has the right to



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to contract and be contracted with, to sue and be sued, as if *sole*. *Clark v. Valentino*, 41 Ga., 143. See also as supporting the same view, the following cases: *Rhea v. Rhormer*, 1 Peters, 105; *Cornwall v. Hoyt*, 7 Conn., 427; *Arthur v. Broadnax*, 3 Ala., 557; *Jones v. Stewart*, 9 Ala., 855; *Roland v. Logan*, 18 Ala., 307; *Ross v. Bates*, 12 Mo., 47; *Starrett v. Wynn*, 17 Serg. & Rawle, 130; *Bean v. Morgan*, 4 McCord, 143; *Valentine v. Ford*, 2 P. A. Brown, 193.

It would seem to follow, by reasonable analogy, that where a married woman is, for any such reason, liable to be sued as if *sole*, at least in an action at law, she may, if otherwise amenable to the provisions of the bankrupt act, be proceeded against thereunder. Accordingly it was held in England in *ex parte Franks*, 7 Bing., 753, that the wife of a convict sentenced to transportation was liable to be made a bankrupt, she having become a trader, although her husband had not been sent out of England. The sentence of transportation against her husband rendered her liable to suit generally; and the fact that she had become a trader brought her within the provisions of the English bankrupt law.—*Editor of Central Law Journal*.

## SUPREME COURT OF PENNSYLVANIA.

JOHN SCOTT ET AL. V. THE NATIONAL BANK OF CHESTER VALLEY.

### *Bank—Bailment—Negligence.*

The plaintiffs below, who keep an account with the defendant, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller, who had always borne a good character.

*Held*, 1. That the bank was a gratuitous bailee, and as such not liable, except for gross negligence.

2. That neither the fact, that the bank might have discovered that the teller was dishonest, by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the "individual ledger," which was the only book which was a check upon him, nor that he was not dismissed, when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable.

3. That nothing short of knowledge or reasonable grounds of suspicion by the bank, that the teller was unfit to be appointed or retained, would render it liable: *Foster v. Essex Bank*, 17 Mass., 475, approved and followed; *Lancaster Bank v. Smith*, 12 P. F. S. (62 Penna. Stat.), 47, remarked on.

[Feb. 16, 1874.]

Error to the Court of Common Pleas of Chester County.

AGNEW, C. J.—As early as the case of *Tompkins v. Sallmarsh*, 14 S. & R., 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe keeping, except for gross negligence. In that case, the package was stolen from the valise of the bailee, at an inn in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822).

The same rule is laid down by Justice Coultter, *arguendo*, in *Lloyd v. West Branch Bank*. He says, a mere depository, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence, which in its effects on contracts, is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derives from *Coggs v. Bernard*, 2 Lord Raymond, 909, (1 Smith's Lead. Ca., Part I., 369, ed. 1872); and *Foster v. Essex Bank*, 17 Mass., 501. In the latter case, the law of bailment was exhaustively discussed by Parker, C. J., and the conclusions were as above stated. It was further held that the degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the bailee uses towards his own property of a similar kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said, that from such special bailments, even of money in packages, for safe keeping, no consideration can be implied. The bank cannot use the deposits in its business; and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous, and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there have been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in this State is stated by Thompson, C. J., in *Lancaster Bank v. Smith*, 12 P. F. Smith, 54. He says, "The case on hand was a voluntary bailment, or, more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the Chief Justice, that the same idea was sufficiently expressed by the judge below in using the words, want of ordinary care. It may be proper, however, to say, that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe-keeping, as from fire, theft, &c., and hence is not the measure in such a case as that before us, which we have seen is gross negligence.

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That case was one where the teller of the bank delivered the deposited bonds to a stranger, calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. There the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller; but the taking of the bonds was not an act pertaining to his business, as either clerk or teller. The bonds were left at the risk of the plaintiff, and never entered into the business of the bank. Being a bailment merely for safe keeping, for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed, or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers would not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about \$26,000.

It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable.

The Court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor,

whose loss arose not from the account as kept by him, but from a larceny, a transaction outside of his employment.

We perceive no error in this. The negligence constituting the ground of liability, must be such as enters into the cause of loss. But the false entries in the books, and the want of their discovery, were not the cause of the bailor's loss, and not connected with it. True the same person was guilty of both offences, but the acts were unconnected and independent.

Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stock. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty; but as the judge well said, had he been found at the gaming table, or engaged in some fraudulent or dishonest practice, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of stock, had discovered that he was engaged in stock gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock gambling, can be safely trusted; and the evidence of this is found in the numerous defaulters, whose speculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer, having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on, and he ventures again to retrieve his loss or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step which ends in ruin to himself and to those whose confidence he has betrayed. Hence, any evidence of stock gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks, as a gambler in them, were unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.—*Legal Intelligencer.*

## LAW SOCIETY—EASTER TERM, 1874.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, EASTER TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

JOSEPH EGBERT TERHUNE.  
PETER MCGILL BARRIE.  
CHARLES EGBERTON RYMERSON.  
ALFRED SERVOS BALL.  
CHARLES EDGAR BARRER.  
FRANK D. MOORE.  
HARRISUEL MADDEN DERBOCHT.  
CLARENCE WIDMER BALL.  
E. GEORGE PATTERSON.  
GEORGE LEVACK B. FRASER.

These gentlemen are called in the order in which they entered the Society and not in the order of merit.

Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

JOSEPH JAMES GORMULLY.  
E. GEORGE PATTERSON.  
THOMAS HORACE MCGUIRE.  
CHARLES EGBERTON RYMERSON.  
DAVID ROBERTSON.  
GEORGE LEVACK B. FRASER.  
A. BASIL KLEIN.  
ALFRED TREVOS BALL.  
JOSHUA R. MITCHELL.  
ARTHUR LYNCHBURST COLVILLE.  
CLARENCE WIDMER BALL.  
D. ELLIS MCMILLAN.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

GEORGE ROBERT GRASSETT.  
JOHN MAXWELL.  
WILLIAM SUTTON GORDON.  
JAMES CRAIG.

*Junior Class.*

FRANK FITZGERALD.  
DUNCAN DENNIS RIORDAN.  
DAVID HALDANE FLETCHER.  
ISAAC CAMPBELL.  
JAS. W. HOLMES.  
NICHOLAS DUBOIS BUCK.  
ARTHUR BHATTY.  
JOHN SANDFIELD McDONALD.  
JOHN ARTHUR PATRICK McMAHON.  
WILLIAM JAMES LAVERTY.  
JOHN LEWIS.  
ANDREW HALLIEY HUNTER.  
JOHN JACOB WHEELER STONE.  
JOHN GIBSON CURELL.  
MAXFIELD SHEPPARD.  
GEORGE ALBERT FLETCHER ANDREWS.  
WALTER JAMES READ.  
THOMAS WILLIAM PHILLIPS.  
NATHANIEL MILLIS.  
JOHN MALCOLM MUNRO.  
JOHN JOSEPH BLAKE.  
WM. EDGAR STEVENS.  
CHARLES EGBERTON MACDONALD.  
COLIN SCOTT RANKIN.  
CHARLES MICHAEL FOLEY.  
JOHN GRENLEY KELLY.  
JOHN ROSS MCCOLL, and  
HARVEST JOSEPH BRAUMONT as an articled clerk.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 23, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. 1, Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR JULY.

- 1 Wed....*Dominion Day.* Long Vac. beg. Master and Reg. in Chy., Cks. and Dep. Cks. Crown to make fees. Co. Treas. to make ret. to Local ret. of under Cks. (32 V. c. 36, s. 113. Co. Coun. to equalize [assessment rolls (do. s. 71.)
- 3 Fri.....Quebec founded, 1608.
- 5 SUN...*5th Sunday after Trinity.*
- 6 Mon.....Co. Ct. Heard. Term begins in Devises sittings begin.
- 9 Thurs..[Cks. Crown to pay over fees to Prov. Dep.
- 10 Fri.....Last day for Master and Reg. in Chy., Cks. and Treas.
- 11 Sat.....Last day for notice of primary exams.
- 12 SUN...*6th Sunday after Trinity.*
- 13 Mon.....Last d. new div. of Wards in Cities & Towns (Mun.
- 14 Tues....[Act, s. 18). Last d. for Co. J. to ret. ass. appt.
- 15 Wed....[Ck. of Mun. (32 V. c. 36, s. 63 (6).)
- 16 Thurs..Heir and Dev. sittings end. Cawnpore massacre 1857.
- 19 SUN...*7th Sunday after Trinity.*
- 22 Wed....*Mary Magdalen.*
- 25 Sat.....St. James. Battle of Lundy's Lane, 1812.
- 26 SUN....*8th Sunday after Trinity.*

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THE

Canada Law Journal.

Toronto, July, 1874.

The bill of Mr. Bass to abolish imprisonment for debt in England, has been defeated by a vote of 215 to 72. The measure was not only wrong in principle, but badly and illogically worked out in detail.

The number of capital convictions in the Dominion of Canada since 1st July, 1867, as shown by a return printed during the late session of the Dominion Parliament, were 69, of which 42 were for murder, 20 for rape, 4 for piracy, one for wounding with intent to murder, one for stabbing with intent to murder, and one for levying war against Her Majesty. Of these in 40 cases the sentences were commuted to different terms of imprisonment, one was pardoned, and in 28 instances the sentences were carried into effect.

It is difficult to say, and especially so in a new country, where bad taste in matters professional ends, and where unprofessional conduct begins. We are concerned to discountenance both; the former, if unchecked, soon takes the more aggravated form of the latter. We have heard of exception being taken to the advertising of professional cards in the columns of newspapers and periodicals, but whilst thinking this is an extreme view to take, we are inclined to doubt whether the Barrister who, in an historic city in this Province, placarded public places with cards, announcing the fact that he gave special attention to marine protests, has thereby developed a purity of taste in matters professional at all worthy of imitation.

## THE NEW JUDGES—MEETING OF COUNTY JUDGES.

**THE NEW JUDGES.**

On the 16th day of last month William Proudfoot, Q. C., was sworn in as one of the Vice-Chancellors of the Court of Chancery, and, on the day following, Hon. Vice-Chancellor Strong, George William Burton, Q. C., and Christopher Salmon Patterson, Q. C., were sworn in as Justices of the Court of Error and Appeal, under the recent Act.

We have already spoken of this Act, and expressed an opinion that it would have been more satisfactory if some arrangement had been made by "the powers that be" which would have resulted in the appointment, as the new Justices of Appeal, of the three chiefs of the Superior Courts of Law and Equity. We fear that for a time at least the new court will not, as a *Court of Appeal*, owing to the strength of the courts below, secure that confidence which such a court should command. Nor can we be surprised at this, when we see that the new court is partly composed of men taken directly from the Bar; for in a conflict of opinion between a court which from its constitution *may* be composed principally of new men, and a court the members of which have large judicial experience, and have for years undergone a judicial training, there can, we fancy, be no question but that the profession and the thinking public would accept the decision of the latter in preference to the former.

Whilst we feel bound to say as much as this, and once again to deplore the existence of circumstances, whatever they may be, which have deprived the Province, in its court of highest resort, of the services of sages of the law who have grown grey on the judicial bench, we are far from reflecting upon the appointments that have been made. Of Mr. Justice Strong's thorough fitness for his present position we have already spoken, and as to those taken from the Bar, we believe

the choice was fairly and honestly made from the best available material. The observations we have felt it our duty to make being directed not to persons, but to the principle involved, we may properly conclude, as we most gladly do, by congratulating the new judges heartily upon the high position they have attained.

**MEETING OF COUNTY JUDGES.**

There was a large meeting of the County Judges at Osgoode Hall late last month, when various topics of interest were discussed. We are unable now, from want of space, to refer to their proceedings at length, but shall do so next month.

The Board of County Judges also met at the same time. Being aware that the Board was engaged in considering the question of an increase of fees to Division Court officers, under the clauses in the Administration of Justice Act of last session, we were anxious to give officers the earliest intimation of any change made. At the last moment, and at some inconvenience to ourselves, we have procured the table of fees to Clerks and Bailiffs, which will be found substantially correct. It comes into force on the first day of this month. We have not had time to examine the items very carefully but notice that for a great many services no increase whatever has been made, and the Board, it strikes us, has not been very liberal in any case. No doubt the table will, in the cities, overpay officers, but we presume a discriminating tariff, if within the province of the Board, was not deemed expedient. Probably legislation in that direction will be necessary. The tariff will be found on page 207.

We have received copies of Mr. Walkem's annotated edition of the Married Woman's Property Acts, and Mr. Ewart's Manual of Costs, but too late for review in this issue.

## CONSOLIDATION OF STATUTE LAW.

**CONSOLIDATION OF STATUTE LAW.**

We observe in the estimates of the Local House, for this year, the appropriation of five thousand dollars for consolidation of the statute law. No more useful volumes for Canadian legist or layman were ever compiled than those commonly known as the Consolidated Statutes of Canada—Upper Canada and Lower Canada. It is advisable to prosecute the scheme already so happily begun, and to have a re-consolidation of the law at stated and appropriate intervals. Since 1859, the date of our first consolidation of statute law, a sufficient interval has elapsed to warrant the preparation and issue of another volume of like compendious and comprehensive character. Indeed, a revision and consolidation of the statute law of Ontario in each decennial period would not be amiss, when one considers the vast changes and amendments of the laws which take place in ten years of rapidly progressive colonial life.

At present the consolidated statute book of Upper Canada has been, as it were, completely riddled by Parliamentary shot. Hardly a single chapter has been left untouched. Page after page has been excised, and chapter after chapter has been repealed. Taking a comprehensive glance at the changes thus wrought by subsequent legislation, we find that of the chapters in the statutes the following have been totally repealed:—chapter 5, relating to the registration of deeds and instruments creating debts to the Crown; chapter 14, relating to the Court of Impeachment; chapter 28, respecting the procedure in actions of dower; chapter 36, respecting reporters in the Superior Courts; chapter 38, which relates to the office of Sheriff; chapter 41, respecting Homceopathy; chapter 52, respecting Mutual Insurance Companies; chapter 54, respecting Municipal Institutions; chapter 55, respecting the assessment of

property; chapter 59, respecting the public health; chapter 61, respecting game laws; chapter 69, respecting the property of religious institutions; chap. 86, respecting the partition and sale of real estate; chapter 89, respecting the registration of deeds and other instruments; chapter 96, respecting the apprehension of fugitive offenders from foreign countries; chapter 97, relating to high treason, to tumults and riotous assemblies, and to other offences; chap. 99, to prevent the unlawful use of fire arms (section 3 of this Act is not repealed); chapter 100, relating to the desertion of soldiers or sailors; chapter 101, respecting forgery and perjury in certain cases; chapter 110, to allow to any person indicted a copy of the indictment; chapter 111, respecting amendments at trial; chapter 115, respecting the commuting of sentence of death; chapter 116, respecting corruption of blood, and chapter 124, respecting the return of convictions and fines (section 7 is unrepealed.)

In addition to this, account is to be taken of the immense number of minor changes, short of the repeal of whole chapters; such as the excision of sections and the substitution of other sections, the addition of new clauses, the various modifications and amendments, verbal and otherwise, which the legislation of successive years has ingrafted upon or pruned off from the consolidated statute book. Considerations of this kind at once manifest the necessity for re-consolidation or revision, and the immense benefits which the entire community will derive from such work properly done.

The work itself is of a kind which demands no small critical and legal acumen, while the results appear so much like mere compilation, that proper acknowledgments are seldom made or appropriate thanks given to those who engage in labour so unostentatious, and yet so

## CONSOLIDATION OF STATUTE LAW—ERSKINE, DR. KENEALY AND HIS CLIENT.

indispensable. Yet, if we look back to the historical record of law in this Province, as embodied in the earlier revision and the later consolidation of the statutes, we shall find that the names of some of the best lawyers we now have, or ever have had, figure in the work; and, we say confidently, that without the co-operation of such men, the undertakings never could have been accomplished in so efficient and satisfactory a manner as has been the case. Having regard especially to the latter work of consolidation, and considering the vast amount of labour involved, it is astonishing to see how few errors or omissions have been made by the consolidators. Yet a diligent perusal of the reports shows that there are some few such errors and omissions, and it should be the business of the next set of consolidators to correct and remedy these, as a part of their multifarious duties.

The difficulties attending a task of the kind in question are not exaggerated in the report of the commissioners now engaged in the revision of the statute law of the State of New York—albeit it appears that the scope of their commission is more extensive than that given in this Province. They remark that to group together similar statutes; omit redundant or obsolete enactments; make necessary alterations; reconcile contradictions; supply omissions; amend imperfections; prepare annotations; furnish references to decisions, and explain or expound the same; suggest contradictions, omissions and imperfections appearing in the original text, with the mode in which they have been reconciled, supplied or amended; designate statutes deserving repeal, and the reasons therefor, and recommend such new Acts as such repeal may render necessary,—all this forms a work of great magnitude, intricacy and tediousness, and demands the highest intellectual and moral faculties. The performance of this labour, they go on to

observe, necessitates the careful re-writing of nearly every section, a constant study of reported cases, the comparison of inconsistent authorities, the searching for and application of proper legal principles, and careful deliberation on the language to be employed in the expression of the ideas.

No doubt the undertaking is much simplified in Ontario, and the present consolidators will enter upon and largely benefit by the labours of their predecessors. Still there is much new law that will task the powers of our best legists—say, for instance, the codifying, as it were into one Act, all the provisions relating to the administration of justice, as found in the Acts specially so designated, and in the various provisions spread over the Common Law Procedure Act and the multitudinous amendments thereof. However, in such a beneficial work we can afford to hasten slowly, and to spend thereon four or five-fold the sum already appropriated. But we must also have the best talent the country can boast of to make the work satisfactory.

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**ERSKINE DR. KENEALY AND HIS CLIENT.**

Our friends of the *Albany Law Journal* defend Dr. Kenealy with a pertinacity worthy of a better cause. There probably never was a worse case than that of the learned doctor except his late client's, and as the doctor was driven in the desperateness of that case to use the most forlorn arguments, so his American champions are compelled to raise very novel and startling pleas in his defence. We are so accustomed to look for what is lively and humorous in the columns of the *Albany Law Journal*, that we may be forgiven if, in reading its last article on the Tichborne case, we feel the same doubt which often distresses the readers

## ERSKINE, DR. KENEALY AND HIS CLIENT.

of Mark Twain's books, namely, whether the author is speaking seriously or in jest. A parallel between Dr. Kenealy's wholesale and reckless vituperation, and Erskine's well-merited denunciation of Lord Sandwich in Captain Baillie's case, could hardly be drawn in sober earnest. Such a parallel the *Albany Law Journal* draws, and, in fact, argues that if Dr. Kenealy is to be rebuked by the press, forsaken by his associates, and deprived of his gown Erskine should have been treated in the same way. Is the *Journal* only laughing at the poor doctor, or does it speak with serious simplicity? We have not space to catalogue the transgressions for which Dr. Kenealy is brought to task, but we must take the liberty of reminding our contemporary of some of the principal offences of which, as every one who followed the course of the trial knows, he was guilty. He assailed in the most unmeasured terms the Roman Catholic priesthood, whom he accused of being in a wicked conspiracy to obtain possession of the Tichborne revenues, an accusation which had not a solitary fact for its foundation. He constantly asserted that the government was using sinister means to bring about the conviction of his client. He aspersed the character and motives of numbers of disinterested witnesses who were so unfortunate as to give testimony that told against him, such attacks being totally unsupported by evidence. He traduced Lady Radcliffe in such a way that the jury thought it necessary to refer specially to his aspersions in their verdict. He impeached the honesty and insulted the dignity of the Bench, so that even the *Albany Law Journal* declared "that had Dr. Kenealy addressed such remarks to an average American Court, he would not have escaped with a lecture." Nor were the offences referred to committed once only and without premeditation, but they were persisted in and repeated through-

out the whole of an address of extraordinary length. This is the advocate for whose conduct Erskine's history is supposed to furnish a parallel. We entreat the writer in the *Albany Law Journal* to read the story of *Rex v. Baillie* again. We think a second perusal will lead him to agree with us that the mere technical error of animadverting on the conduct of Lord Sandwich, a corrupt and profligate politician who, in the political prosecution in question, was chiefly interested in obtaining a judgment adverse to Captain Baillie, and was known by all to be "the dark mover behind that scene of iniquity," bears no similitude to the manifold and repeated offences of Dr. Kenealy. With great deference also we beg to remind our contemporary that though (as he truly says) the English people "took" to Mr Erskine, after his astonishing *début*, the "government" of the day did not "take" to Mr. Erskine at all, Lord Sandwich, the real prosecutor in *Rex v. Baillie*, being a member thereof. Furthermore, that Erskine's history furnishes an example, and by no means an uncommon one, of the way an English advocate pushes on, not through royal favor, for George III. hated the Whigs, to whom Erskine belonged, but in spite of royal dislike. Erskine's greatest fame was gained in State trials, when he defended men whom the King's favorite minister, the younger Pitt, had indicted for high treason. We mention these facts in answer to certain remarks about the subserviency natural to English lawyers, which are made, doubtless with sincerity, in the article under notice.

The *Albany Law Journal* speaks of the King sending the horse-guard and galloping people off to the Tower: of Orton finding it necessary to cross the Irish channel to get a counsel: of English lawyers being dependent on the Crown for advancement: of the difference it would have made in the Tichborne case had



## MASTER AND SERVANT—FELLOW SERVANTS.

"her majesty the queen?" (—initial letters all small, according to the principles of democracy, if not of orthography, the strong point of the article being that we spell Judges with a capital J.,) expressed an interest in Mr. Orton: of the difficulty the next "claimant" will have in finding a counsel, &c. These things show an acquaintance with the character and institutions of the English which is really surprising. When we read them we are irresistibly reminded—we say it in all good-nature—of a certain passage in that famous book, "Martin Chuzzlewit."

"Hush! Pray, silence!" said General Choke, holding up his hand, and speaking with a patient and complacent benevolence that was quite touching. "I have always remarked it as a very extraordinary circumstance, which I impute to the nature of British institutions and their tendency to suppress that popular inquiry and information which air so widely diffused, even in the trackless forests of this vast continent of the Western Ocean, that the knowledge of Britishers themselves on such points is not to be compared with that possessed by our intelligent and locomotive citizens. This is interesting, and confirms my observation. When you say, sir," he continued addressing Martin, "that your Queen does not reside in the Tower of London, you fall into an error, not uncommon to your countrymen, even when their abilities and moral elements air such as to command respect. But, sir, you air wrong. She *does* live there!"

## SELECTIONS.

## MASTER AND SERVANT—FELLOW SERVANTS.

We (*Central Law Journal*) publish elsewhere in this number the opinion of the Supreme Court of the United States on the general subjects indicated in the title, which was recently given in the case of the *Union Pacific Railroad v. Fort*, and in a note thereto the opinion of the same court in the case of the *Northwestern Union Packet Co. v. McCue*. Both opinions were prepared by Mr. Justice Davis, and they will be read with great interest by the profession, who will not fail to approve the sound, salutary and liberal doctrine so clearly declared in Fort's case.

We avail ourselves of the occasion to make some editorial observations on the more important aspects of the general subject of the Liability of Masters to Servants. The courts of Great Britain and America have established the general doctrine of the non-liability of the employer for an injury to one servant caused by the negligence of another servant in the same common employment. In England this doctrine has been affirmed time and again by every court in Westminster Hall, and finally by the House of Lords after full argument by able counsel and upon the most deliberate consideration.—*Bartonshill Coal Co. v. Reid*, 3 Macqueen App. Cas. 266. The first case was *Priestley v. Fowler*, 3 M. & W. 1. In *Holmes v. Clarke* (itself an important case on this subject), 7 H. & N. 937, 947, 1862, Mr. Justice Byles remarks: "The case of *Priestley v. Fowler* introduced a new chapter into the law, but that case has since been recognized by all the courts, including the Court of Error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land.

In a very recent case this rule is said to be "conclusively settled." *Feltham v. England*, L. R. 2 Q. B., 33, 1866. In this case Mellor, J., says that "this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful direction the plaintiff was bound to obey."

In another case it is said: "A foreman is a servant as much as the other servants whose work he superintends." Per Willes, J., in *Gallagher v. Piper*, 111 Eng. C. L. 669, 1864. Further, as to who are "fellow-servants" within the rule, see *Wigmore v. Jay*, 5 Wellsby Hurl. & Gord. 354, 1850; *Skipp v. Eastern Counties Railway Co.*, 9 ib. 221; *Wiggett v. Fox*, 11 ib. 832; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Waller v. South, etc., Railway Co.*, 2 H. & C. 102; *Gallagher v. Piper*, 111 Eng. C. L. 669; *Morgan v. Vale, etc., Railway Co.*, 5 B. & S. 570, 736; *Tunney v. Midland, etc., Railway Co.*, Law Rep. 1 C. P. 291; *Lovegrove v. London, etc., Railway Co.*, 16 C. B. N. S. 669. See *Murphy v. Smith*, 19 C. B. N. S. 361, as to servant being considered as the mas-

## MASTER AND SERVANT—FELLOW SERVANT.

ter's representative in the establishment. On this last point, see also remarks of Mr. Justice Davis in Fort's case to the effect that Collett, who had been entrusted by the railroad company with the care and management of dangerous machinery, was the representative of the company, which was liable "either upon the maxim of *respondet superior* or upon the obligations arising out of the contract of service" for Collett's wrongful order to the plaintiff—that order relating to a duty within the scope of Collett's employment and outside the scope of the plaintiff's engagement, and wholly disconnected with it.

In this country the *general rule* is recognized as the law by the courts of, perhaps, every state which has passed upon the question, except where it is changed by statute. The only dispute is as to the extent of the rule, or rather as to the cases to which it is justly applicable. It is not necessary to cite the American cases; they will be found mostly collected in the Treatise of Shearman & Redfield on Negligence. We do not recollect any case in the Supreme Court of the United States, either directly sustaining or rejecting the general doctrine. It is noticeable, however, that in the case of the *Northwestern Union Packet Co. v. McCue*, decided at the present term, Mr. Justice Davis, delivering the opinion of the court, remarks: "It is insisted on the part of the plaintiff in error, that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant in the same general business;" but "*whether this general proposition be true or not it is not necessary to determine in the state of this record.*" And in Fort's case the same learned justice observes: "It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition, as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case."

This language would lead to the inference that the Supreme Court may entertain doubts as to the soundness of the

rule under discussion. But as the general doctrine is so firmly rooted by judicial decisions in Great Britain and in the different state courts of this country, as it is one which pertains to general jurisprudence, and involves no question of *federal law*, it would seem that it is no more open to re-agitation in a federal court than in any other court of common law powers.

We next mention some exceptions to the rule, or cases which are not considered as falling within its reasons, and to which, therefore, it does not apply. We consider it to be settled, both in England and America, that the master is bound to use ordinary care to employ, or to retain in his employment, *none but competent servants*, and to use like care to *furnish and maintain suitable and safe machinery and structures*. *Bartonskill Coal Co. v. Reid, supra*; *Tarrant v. Webb*, 18 C. B. 797; *Weems v. Mathieson*, 4 Macqueen 215; *Clarke v. Holmes, supra*; and see cases next cited. We also consider that view to be correct, and regard it as quite conclusively settled by the courts, that this duty of the master is so far personal and inalienable that responsibility for injuries directly caused by the negligent discharge of it exists, although the master may for his own convenience act through other servants. On this subject see the following very recent cases in addition to those last cited: *Brothers v. Cartter*, 52 Mo. 372, 1873, and cases cited by Wagner, J.; *Gilman v. Eastern Railroad Co.*, 10 Allen, 233; s. c. 13 Allen 433, and cases cited by Gray, J.; *Loring v. N. Y. Central R. R. Co.* 49 N. Y. 521, 1872. And the reason is that this duty of the master is direct and personal, and must be discharged in person or by others for him, for whose negligent acts and omissions he is responsible where these are the immediate cause of injury to his servants.

On this point we call attention to the following observations of Mr. Justice Davis in Fort's case: "It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking,

## MASTER AND SERVANT—FELLOW SERVANTS—SHOULD ACCUSED PERSONS BE WITNESSES!

among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

In this connection an important practical question may be adverted to, and that is, as to the effect of knowledge on the part of the servant injured that the master had not discharged his duty in providing competent fellow-servants or fit and safe materials or machinery. The following are the more important cases on this point: *Watling v. Oastler*, Law Rep. 6 Excheq. 73, 1871; *Senior v. Ward*, 1 E.L. & E.L. 385 (102 Eng. C. L. 384); *Dynen v. Leach*, 26 L. J. 221; s. o. 40 Eng. L. and Eq. 491; *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648; *Smith v. Dowell*, 3 F. & F. 238; *Loring v. New York Central R. R.*, 49 N. Y., 521, 1872 (full discussion); *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105, 127, 1870, where the cases are referred to and the subject fully examined by Cooley, J.; *Hayden v. Manufacturing Co.*, 26 Conn., 538, 1861; *Buzzell v. Manufacturing Co.*, 48 Maine, 113; *Jones v. Yeager*, 2 Dillon C. C. 65, 68. They authorize the deduction of the general rule that if the plaintiff voluntarily continue in the master's service with full knowledge of the incompetency of the co-servant, or of the unfit and defective machinery, and

of the danger thereby occasioned, this will be considered such "contributory negligence" on his part as to defeat his right to recover unless upon some special ground, as in *Holmes v. Clark*, 6 Hurl. and N. 349, affirmed 7 ib. 937, where the servant made complaint, and the master thereupon promised that the grounds of it should be removed. This rule, that knowledge by the servant injured of the danger will disentitle him to recover if he voluntarily remains in the service without complaint, clearly applies to a case where it is the duty of the servant himself to inform the master or superior of the co-servant's unfitness, or the unfitness of the materials or structures. The reason for this exemption of the master from responsibility, would not seem to apply when the servant injured could not reasonably be held to know the danger to which the master's neglect of duty exposed him. It seems to us that some of the cases have asserted rather too rigid a rule against the servant, arising out of his knowledge of the neglect of the personal duty of the master as respects co-servants and materials, and his supposed acquiescence in it; and there are aspects of this subject that need to be further discussed and decided before the law can be regarded as settled.

## SHOULD ACCUSED PERSONS BE WITNESSES?

At the late Social Science Congress the following question was discussed:—

"Is it desirable that defendants in criminal proceedings should be competent or compellable to give evidence in their own behalf, or on behalf of or against others jointly indicted?"

We heartily agree with the Attorney-General that if we are to alter our law, the alteration must be thorough. An optional witness would be an intolerable anomaly, and if an accused person is to be a competent witness he must also be a compellable witness.

The gentlemen who have from time to time agitated this question do not appear to have tested their theories by facts. We all admit that the object of a judicial inquiry should be to elicit truth, and that is also the professed object of

## NEGLIGENCE—PROXIMATE AND REMOTE DAMAGE.

the English criminal law. Do we hinder the attainment of that object by shutting the mouths of the accused, or, to be more accurate, by not allowing them to give evidence on oath?

Now, a vital principle of our law is the presumption of innocence, and that being so, no man can be lawfully convicted except by the weight of the evidence adduced against him. But the mere denial of the accused person on his oath would not and ought not to greatly influence the jury. When there is an almost irresistible temptation to commit perjury the testimony is worthless. Let us suppose a case in which, if the accused person is convicted, he will be sentenced to ten years' penal servitude. For ten years he will be cut off from human society and from his nearest and dearest relations. He is sworn, and, without the slightest conscientious scruple, falsely avers that he is guiltless. But then we shall be told that there will be the cross-examination to elicit the truth. Well, if the accused is a stupid person, the cross-examination is likely to damage his case whether he is innocent or guilty. If the accused is a smart person, he need not dread the cross-examination. His game is an easy one. His position is not like the position of any other witness. He does not care a jot about the danger of a prosecution for perjury. He is only solicitous to escape from a present peril. If he is acquitted, the verdict of the jury will be a testimony that he has spoken the truth. If he is convicted, and has a heavy sentence passed upon him, he is no worse off on account of his flagrant perjury.

The lips of an accused person are not sealed. We do not refer to the privilege of making a statement after conviction, and before the Court passes sentence. We say that, throughout the trial, the accused speaks by the mouth of his counsel. The witnesses for the prosecution are cross-examined, and the witnesses for the defence examined, according to the instructions of the accused. Moreover, the counsel for the prisoner, in his address to the jury, has the opportunity of giving the prisoner's explanation of the circumstances; and we do not think that the oath of a person in jeopardy of penal servitude would be of more value than his unsworn statement.

On the whole we see no reason for changing our system, whilst we see grave objections to accused persons giving evidence on oath.—*The Law Journal*.

## NEGLIGENCE—PROXIMATE AND REMOTE DAMAGE.

One of the most interesting cases on the law of negligence which has been determined for some time is the *Metallic Compression Casting Company v. Fitchburg Railroad Company*, decided by the Supreme Judicial Court of Massachusetts, and to appear in volume 109 of the Massachusetts Reports. It will be found in the American Law Times Reports (N. S.) vol. 1. p. 135.

On the 24th of January, 1870, a little before midnight, the plaintiff's manufacturing establishment was discovered to be on fire. The buildings were situated in Somerville, about fifty feet south of the track of the Fitchburg railroad. Two fire engines were brought upon the ground, belonging to the Somerville fire department, and one from Cambridge. Not being able to procure a supply of water otherwise, they laid the hose across the railroad track, under the direction of the chief engineer of the Cambridge fire department, and obtained a supply from a hydrant on the north side of the track. The water was, by means of the hose, applied to the fire and diminished it, and would probably have extinguished it in a short time but for the acts of the defendants. At that time a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped and had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train and thereby severed it and stopped the water. They injured the hose so much that it could not be seasonably repaired, and thereby the plaintiff's buildings were consumed. They did not delay to give time for uncoupling the hose, which would have delayed them but a few minutes. The railroad was crossed by another at a grade a few hundred feet before the place where the hose was severed; and the train was not stopped before the crossing, as required by the Gen. Stats. c. 63, § 93.

## DESTRUCTION OF PRIVATE PROPERTY TO PREVENT SPREAD OF FIRES.

The owners of the buildings bring this action to recover damages against the railroad corporation; and upon the foregoing facts the court hold: (1) that the violation of the statute did not affect the defendants' liability; (2) that the firemen had a right at common law to lay the hose across the railroad; (3) that it was immaterial that they were volunteers from another town; (4) that it was immaterial that the plaintiff did not own the hose; (5) that the severing of the hose was the proximate cause of the destruction of the building; and (6) that the defendants were liable for the negligence of their servants in severing the hose.

Upon the question that the injury was too remote to entitle the plaintiff to recover Mr. Chief Justice Chapman, in pronouncing the judgment of the court, said: "The question of proximate cause is often involved in difficulty, by reason of the endless variety of circumstances in which injuries may occur; and the cases on the subject are very numerous. A case which much resembles the present is *Atkinson v. Newcastle & Gateshead Waterworks Co.*, Law Reports, 6. Exch. 404. The plaintiff's saw-mill and lumber-yard took fire; and in consequence of the defendants' neglect in respect to the head of water, the plaintiff could not obtain a supply, and their property was burned. It was held, that the defendants were liable on the common-law principle stated in Comyn's Digest, Action on the Case, A: 'wherever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages.' The defendants contended that the damages were too remote, but the court held otherwise. Kelly, Ch. B., significantly asked, 'what kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?' Baron Bramwell remarked that it was the immediate consequence of the proximate cause. *Couch v. Steel*, 3 El. & Bl. 402, was cited as decisive of this principle. Among other cases illustrating the subject of direct consequence are *Scott v. Shepherd*, 2 W. Bl. 892; *Gilbertson v. Richardson*, 5 C. B. 502; *Lee v. Riley*, 18 C. B. (N. S.) 722; *Dickinson v. Boyle*, 17 Pick. 78; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass., 64. Other cases are cited

where the damages are held to be too remote, but they are unlike the present case. The law regards practical distinctions rather than those which are merely theoretical; and practically, when a man cuts off the hose through which the firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury."—*Central Law Journal*.

## DESTRUCTION OF PRIVATE PROPERTY TO PREVENT SPREAD OF FIRES.

It is difficult to conceive how an advocate could face a court of justice—especially such a court as the Supreme Judicial Court of Massachusetts—and assert that, because a railroad company had obtained a legal title to the land occupied by its track, a fire company could not lawfully lay a hose across it for the purpose of extinguishing a fire. Yet this proposition was asserted in *The Metallic Compression Casting Company v. Fitchburg Railroad Company*, 1 Am. Law Times' Reports (N. S.) 135; and the court was obliged to reiterate a principle which has been familiar to lawyers, at least, since the time of Lord Coke. In 12 Coke 13, it was said, in illustrating a principle which was resolved by all the judges, that "for the commonwealth a man shall suffer damage; as, for saving of a city or a town, a house shall be plucked down if the next be on fire; and the suburbs of a city, in time of war, for the common safety, shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action." In *British Cast Plate Manufacturers v. Meredith*, 4 Term R. 796, it is said, by Butler, J., "there are many cases in which individuals sustain injury for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil-law writers indeed say that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, etc. This is one

## DESTRUCTION OF PRIVATE PROPERTY TO PREVENT SPREAD OF FIRES.

of those cases to which the maxim applies, *salus populi, suprema lex.*" In *The Mayor, etc., v. Lord*, 18 Wend. 129, it is said by the Chancellor Walworth that "the rule appears to be well settled that in case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other public calamity, the private property of an individual may be lawfully taken or destroyed for the relief, protection or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained." See, also, to the same general effect, *Russell v. Mayor, etc.*, 2 Denio, 461; *Hale v. Lawrence*, 1 Zab. 714; *American Print Works v. Lawrence*, 1 Zab. 248; *Lorocco v. Geary*, 3 Cal. 69; *Meeker v. Van Rensselaer*, 15 Wend. 397; *McDonald v. Pedwing*, 13 Minn. 38. The Supreme Judicial Court of Massachusetts had also said, in *Taylor v. Inhabitants of Plymouth*, 8 Metc. 465, that, "independently of the statute, the pulling down of a building in a city or compact town in time of fire, is justified upon the great doctrine of public safety, when it is necessary."

So much for the general principle. It remained, however, for a railroad company to assert that it was unlawful to lay a fireman's hose across its track to reach the only water which was accessible in order to save a large manufacturing establishment which was on fire. While in such emergencies the houses of private citizens may be torn down and blown up, and their property taken or destroyed as far as necessary, the convenience of a corporation must not be temporarily interrupted! The court, however, thought otherwise. Mr. Chief Justice Chapman, after reiterating the general principle laid down in the foregoing cases, said:

"The elaborate provisions which our statutes have made for the extinguishment of fires, indicate the magnitude of the interest which the community has in preventing the spread of conflagrations, but these statutes do not supersede the common law. Their purpose is merely to enable the community to protect themselves more effectually than they could do otherwise. Thus the organization of

a fire department, with officers and implements, does not deprive the people of a neighbourhood from obtaining an engine and hose and crossing the neighbouring lands to obtain water for stopping a conflagration, without waiting for an organization; and individuals may climb upon neighbouring roofs to carry buckets of water. It is a sufficient justification that the circumstances made such an invasion of private property reasonable and proper in helping to extinguish the fire. The objection of the defendants that the officers of the fire department in Cambridge had no jurisdiction in Somerville, and could not act officially in that town, has no validity. They had a fire company organized, and an engine and hose, and were in the vicinity of the building, and they could not with propriety stand idly by and witness the spread of a fire which they might extinguish, merely because it was beyond the town line. They had a right, as citizens, to do what they reasonably could to prevent this public calamity, whether in their own city or a neighbouring town."

The court, however, intimate that there may be a limit to this principle, but where that limit is to be drawn is a question for the jury. Thus, the chief justice said: "It is urged that upon this principle one person may enter upon the property of another for the purpose of extinguishing a fire in a small building of no importance, and where there is no danger to other buildings. Undoubtedly the principle is to have a reasonable limitation. He who enters upon the property of another takes upon himself the burden of establishing the fact that there was a just occasion for it, and in this case the plaintiffs must submit to the jury, with proper instructions, the question whether there was good cause for laying the hose across the defendant's track. All that the court can say is that there is sufficient evidence to submit to the jury."—*Central Law Journal*.

C. L. Cham.]

NOTES OF CASES—McCLINTOCK'S APPEAL

[U. S. Rep.]

## CANADA REPORTS.

## ONTARIO.

## NOTES OF RECENT DECISIONS.

## COMMON LAW CHAMBERS.

(Reported by Mr. H. J. SCOTT, B.A., Student-at-Law.)

## CARNEGIE V. TUEB.

*Insolvent Act of 1864-1869—Application of.*

[March 31, 1874—MR. DALTON.]

In this case a summons was taken out to set aside a *fi. fa.* on the ground that the defendant had made an assignment, and obtained his discharge, under the Insolvent Act subsequent to the debt. An affidavit was put in that the defendant was an innkeeper, and it was therefore contended that he could not take advantage of the Act, as not being a trader. The assignment was made in March, 1869, under the Act of 1864. The Act of 1869 was passed on the 22nd of June of that year, and the discharge was not obtained until November, 1870, and was entitled "Insolvent Act 1869."

*Held*, that the proceedings being commenced under the Act of 1864, they must all be considered as taken under that Act, the procedure merely being regulated by the Act of 1869, and as the former Act was not confined to traders, the summons was made absolute.

## DICKENSON V. HARVEY.

*Suggestion on roll of death of Sheriff—Who entitled to execution.*

[April 20, 1874—MR. DALTON.]

This suit was on notes seized under a *fi. fa.* and after judgment recovered the Sheriff died.

*Held*, upon an application to enter a suggestion of his death upon the roll, that his executor, and not the Sheriff who succeeded him in office, were entitled to execution.

## SPEERS V. GREAT WESTERN RAILWAY CO.

*Postponing trial—Accident—Damages.*

[May 2, 1874—MR. DALTON.]

This was an application to put off trial. The plaintiff was injured by an accident on the defendant's railway, and affidavits were put in to the effect that sufficient time had not elapsed from the date of the accident to tell properly

whether the injury would be permanent, and thus enable the jury to assess damages.

*Held*, that this was a sufficient reason for putting off the trial, and an order was accordingly made upon payment into Court, as upon a plea of payment into Court, of \$1,000.

## TAYLOR V. GRAND TRUNK RAILWAY CO.

*Leave to amend—Stay of proceedings.*

[May 16, 1874—MR. DALTON.]

In this case an order was made granting leave to plead and demur, with liberty to plaintiff to amend within a certain time, but without any express stay of proceedings. Before the expiration of the time for amendment the defendants filed and served pleas and demurrer.

*Held*, that giving a certain time to amend pleadings operates as a stay of proceedings, as to pleadings, until the expiration of that time, and the pleas and demurrer were set aside as irregular.

## UNITED STATES REPORTS.

## SUPERIOR COURT OF PENNSYLVANIA.

## McCLINTOCK'S APPEAL.

*Sale of growing timber.*

1. In agreements for the reservation or sale of growing timber, whether the timber is to be regarded as personal property, or an interest in real estate, depends on the nature of the contract, and the intent of the parties.
2. If the agreement does not contemplate the immediate severance of the timber it is a contract for the sale or reservation of an interest in land, and until actual severance, the timber in such case passes to the heir, and not to the personal representative.
3. When the agreement is made with a view to the immediate severance of the timber from the soil, it is regarded as personal property, and passes to the executor and administrator, and not to the heir.

Certiorari to the Orphans' Court of Lycoming county.

Opinion by WILLIAMS, J. Delivered October 23d, 1872.

The Orphans' Court was clearly right in deciding that the pine and hemlock timber reserved by the decedent in his deed to the administrator, was personal property, and in charging him with its value. In agreements for the reservation, or sale of growing timber, whether the timber is to be regarded as personal property, or an interest in real estate, depends on the nature of the contract, and the intent of the parties. If the agreement does not contemplate the im-

## U. S. Rep. McCINTOCK'S APPEAL—DIGEST OF ENGLISH LAW REPORTS.

mediate severance of the timber, it is a contract for the sale or reservation of an interest in land, and until actual severance the timber in such cases passes to the heir, and not to the personal representative. But when the agreement is made with a view to the immediate severance of the timber from the soil, it is regarded as personal property, and passes to the executor or administrator, and not to the heir. The earlier authorities, it is true, do not appear to make any distinction between such contracts. Thus, it is said: If tenant in fee simple grants away the trees, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to the executors or administrators, being, in understanding of law, divided as chattels from the freehold, and the grantee hath power, incident and implied to the grant, to fell them when he will, without any other special license. *Stukely v. Butler*, Hob. 173 a. So where tenant in fee simple sells the land, and reserves the trees from sale, the trees are in property divided from the land, although in fact they remain annexed to it, and will pass to the executors or administrators of the vendor. *Harlakenden's Case*, 4 Co., 63 b; *Lifford's Case*, 11 id. 50; 4 Bac. Abr. Tit. Exr's and Admr's, H. 82; 1 Wm's Exr's, 94. But the distinction to which we have adverted, between contracts made with a view to the immediate severance of the timber, and those which are not, is taken in the latter authorities. *Crosby v. Wadsworth*, 6 East, 610; *Smith v. Surnam*, 9 B. & C. 561; 17 E. C. L. 443; Add. Contr. 31, and recognized in our own decisions; *Huff v. McCauley*, 3 P. F. Smith, 206; *Pattison's Appeal*, 11; id. 294. In the case last cited, the present Chief Justice said: We regard a contract for the standing timber on a tract of land to be taken off at discretion as to time, as an interest in land, and within the statute of frauds and perjuries, the transmission of which must be by writing. But in the case in hand, it is manifest that the parties intended by their contract to divide the pine and hemlock timber from the freehold, and give it to the quality of a chattel. It was not to be taken off at discretion as to time. By the express terms of the deed, the vendee of the land had the right to require its removal on giving, and the vendor was bound to take it off on receiving, thirty days' notice. The timber must, therefore, be regarded as a chattel which passed to the administrator. In so ruling, we do not trench upon the doctrine laid down in *Pattison's Appeal*, or qualify it in any respect whatever. The case was unlike this in one of its material elements, and was well decided on its facts; and

the guarded language of the chief justice shows that he had in view the distinction which the law makes in regard to contracts for the reservation or sale of growing timber. If the reservation had been of a perpetual right to enter on the land, and cut all the pine and hemlock timber growing thereon, or of a right to cut and take it off at discretion as to time, then it would be within the rule laid down in *Yeakle v. Jacob*, 9 Casey, 376, and *Pattison's Appeal* and be regarded as an interest in land, which would pass to the heir and not to the administrator, on the vendor's death. But this element, as we have seen, is wanting, and, therefore, the Orphans' Court rightly held, under the authorities, that the timber in question was personal property, for the value of which the administrator was accountable. It needs no argument to show that the vendor received the whole property in the timber, and not merely a right to its "use and advantage" during his life. This is too apparent on the face of the deed to admit of doubt or question.

We see nothing in the facts of this case to take it out of the rule laid down in *Sterrett's Appeal*, 2 Penn's Rep. 419, and it follows that the administrator was properly charged with the costs of the audit.

Decree affirmed at the cost of the appellant.  
—*Philadelphia Legal Gazette*.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS

FOR NOVEMBER AND DECEMBER, 1873,  
AND JANUARY, 1874.

From the American Law Review.

ACCUMULATION.—See APPOINTMENT, 2; DEVISE, 4.

ACTION OF BANKRUPTCY.—See BANKRUPTCY, 1.

## ACTION.

A married woman owning separate real estate raised money, partly for building on said estate, and partly to pay a debt of her husband's. Both husband and wife joined in the mortgage, and the husband covenanted to repay the loan, which was payable in instalments. The husband and wife gave the defendant authority to receive the first instalment, and the defendant received the same and paid said debt, and held the residue for a debt due him from the husband. The husband and wife brought an action, in the wife's right, for said residue. Held, that said wife could be joined in the action.—*Jones v. Cuthbertson*, L. R. 8 Q. B. 504.

See COMPANY, 1; FALSE REPRESENTATION.



## DIGEST OF ENGLISH LAW REPORTS.

ADEMPTION.—*See* DEVISE, 1.

ADVANCE.—*See* DEVISE, 6; SETTLEMENT, 2.

## AMALGAMATION.

One part of an indenture in two parts, expressing the term of amalgamation of two companies, was executed by one company, but the second company, before executing their part, added a proviso, altering its terms. *Held*, that said indenture was void, and that there was no amalgamation.—*Wynne's Case*, L. R. 8 Ch. 1002.

AMBIGUITY.—*See* LEGACY, 4.

ANCIENT LIGHT.—*See* PARTY-WALL.

ANNUITY.—*See* ELECTION; LEGACY, 2.

## APPOINTMENT.

1. A testator, who had power to appoint the income of a fund to his wife for her life, after directing that his debts should be paid, gave the residue of his property, real and personal, to which he might be entitled, or over which he might have any power of disposition or control, to his wife, her heirs, assigns, and legal representatives. *Held*, that the power was well exercised.—*In re Teape's Trusts*, L. R. 16 Eq. 442.

2. A testator, who had a power of appointment over £6000 charged upon real estate, by his will directed said sum to be invested in the purchase of land, and that the rents of such land should be accumulated in a manner which was void under the Thellusson Act. *Held*, that said rents went to the next of kin, and did not sink into the estate upon which they were charged, nor go to the testator's heirs.—*Simmons v. Pitt*, L. R. 8 Ch. 978.

*See* DEVISE, 2; LEGACY, 1, 6, 9; POWER.

APPROPRIATION.—*See* BILLS AND NOTES.

## ARBITRATION.

1. The plaintiff company contracted to build a railway between certain termini, and the defendant company contracted to maintain said railway, and carry thereon all traffic arising between said termini. And the plaintiff and defendant agreed that all differences between them should be settled by a standing arbitrator to be named by them in January yearly. The plaintiff built said road, and the defendant carried traffic arising between said termini upon its own lines of railway and not over the plaintiff's railway. No arbitrator was appointed. The plaintiff filed a bill praying an injunction to restrain the defendants from carrying traffic arising between said termini over other than their own railway. *Held*, that the court had jurisdiction, and that the injunction should be granted.—*Wolverhampton & Walsall Railway Co. v. London & North-western Railway Co.*, L. R. 16 Eq. 433.

2. Declaration, that the defendant had agreed to keep on certain manors such a number only of hares and rabbits as would do no injury to trees upon the manor; yet that the defendant did not keep such a number, &c. Plea, that one of the terms of the

agreement was, that if such injury was done the defendant would pay a reasonable compensation for the same, to be determined by two arbitrators or an umpire, and that no arbitrators had been appointed. Demurrer, *Held*, that the plea was a good one. There was no liability until an award was made.—*Dawson v. Fitzgerald*, L. R. 9 Ex. 7.

*See* CONTRACT, 1.

ARTICLES.—*See* CORPORATION.

ASSENT.—*See* LEGACY, 9.

## BANKRUPTCY.

1. G. owed money to N., who threatened proceedings for the recovery of his debt. G. stated to N. that he had no money, but that he had some oil, and that if N. could induce a certain firm to buy it he would pay N.'s debt out of the proceeds. N. stated the whole matter to said firm, who agreed to buy the oil of G. At this time G. had no oil, but a few days after he contracted for the purchase of oil from W., and the oil was delivered to said firm at G.'s request. G. never paid W. for the oil, and had no expectation of being able to do so when he ordered it. Said firm paid to N. the amount of his debt at G.'s request. G. became bankrupt. A jury found that said oil, being substantially the whole of G.'s property, was transferred by him when insolvent and not under pressure, with intent to give N. a fraudulent preference. The court thereupon held that the transfer was an act of bankruptcy and a fraudulent preference. On appeal, *Held*, that on the evidence the purchase of said oil was a *bona fide* transaction, and that N. was a payee in good faith and for a valuable consideration; and that there was no act of bankruptcy and no fraudulent preference.—*Ex parte Norton*. *In re Gollen*, L. R. 16 Eq. 397.

2. A. and B., partners, who had borrowed money of their father for the use of the partnership, covenanted, jointly and severally, that when requested by their father, or by a trustee, they would pay said money to trustee, who was to hold in trust for the father for life, remainder to A. and B. as tenants in common; and in the mean time A. and B. covenanted to pay interest upon said money. A. and B. became bankrupt. *Held*, that said trustee had a claim provable against both the separate and partnership estates of A. and B. in bankruptcy, which was not subject to deduction on account of the reversionary interest of A. and B.—*Ex parte Stone*. *In re Welch*, L. R. 8 Ch. 914.

3. In 1866 the C. company, which was indebted to P., agreed to transfer to three other companies its whole undertaking, and the companies agreed to give the contract for constructing the C. railway to P. or his nominee. In 1867 P. executed an inspectorship deed surrendering his effects, and it was provided that he should receive his discharge as soon as all his effects should be assigned to the inspectors. In 1871 P., in consideration of a certain sum of money, nominated a certain firm as contractors to build said railway.

## DIGEST OF ENGLISH LAW REPORTS.

*Held*, that as P. was not a party to the agreement between the C. and other companies, and as the C. company did not make said agreement, or any covenant therein, as trustee for P., P. had no interest under the same which would pass by the inspectorship deed, and that said deed did not affect property coming to P. after the date of its execution. *Ex parte Piercy. In re Piercy*, L. R. 9 Ch. 33.

See COMPANY, 2; EXECUTORS AND ADMINISTRATORS, 3; LIEN, 2; PARTNERSHIP, 3.

**BEQUEST.**—See APPOINTMENT, 1; CHARITY; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; ILLEGITIMATE CHILDREN; LEGACY; LEX LOCI; MARSHALLING ASSETS; MORTGAGE, 3; TRUST, 3, 5.

**BILL OF LADING.**

By the provisions of a charter-party, if any part of the cargo should be delivered in a damaged condition, freight should be payable "on the invoice quantity taken on board as per bill of lading, or half freight upon the damaged portion, at the captain's option." A bill of lading for a certain quantity of barley was signed by the master, who added, however, at the foot of the bill of lading, "quantity and quality unknown." The barley was damaged, and the master claimed freight for the invoice quantity taken on board as per said bill of lading. *Held*, that the master was entitled to the freight he claimed, notwithstanding said memorandum at the foot of said bill of lading.—*Tully v. Terry*, L. R. 8 C. P. 679.

See FREIGHT; INSURANCE, 2.

**BILLS AND NOTES.**

1. L., in Bombay, and G., in London, were engaged in joint transactions in buying and selling goods in India and England. According to their course of dealing, L. drew on G., discounted the drafts in Bombay, and with the proceeds purchased cotton, which was consigned to G., under the agreement that such cotton should be specifically appropriated to meet the bills. *Held*, that holders of such bills were entitled to have the cotton specifically appropriated, subject to the right of the joint creditors (if any) of L. and G. to have the proceeds of such cotton applied as part of the aggregate estate.—*Ex parte Dechurst. In re Leggatt. In re Gladstones*, L. R. 8 Ch. 965.

2. A., in New Orleans, remitted funds to B., in Liverpool, and then sold bills drawn on B., stating that the bills were drawn expressly against funds to a much larger amount already remitted to B. *Held*, that a purchaser of said bills was not entitled to a specific portion of the funds remitted to B.—*Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352.

See EVIDENCE, 1; LETTER.

**BOTTOMRY BOND.**—See WAGES.

**BROKER.**

Certain stock-brokers bought for their principal a large quantity of stock, for which

they paid their own money. The principal died July 19, and on July 16, 18, and 19, the brokers sold the stock, which had fallen in value. In ordinary dealings the brokers would have kept the transaction open with their principal, in accordance with the custom of the Stock Exchange, until July 28. *Held*, that the brokers had a right to recover the difference between the amount paid for the stock and the amount for which it was sold, less any loss occasioned by selling before July 28, the next settling day.—*Lacey v. Hill*, L. R. 8 Ch. 921.

**BURDEN OF PROOF.**

In a case of damage the defendants made no charge of negligence against the plaintiffs, but denied generally the averments in the petition, and pleaded inevitable accident. *Held*, that the burden of proof was on the plaintiffs, and that they must begin.—*The Benmore*, L. R. 4 Ad. & Ec. 132.

**CHARGE.**

A tenant for life, with proviso for renewal, whose estate was subject to certain charges, neglected having a renewal of the lease, which, if duly renewed, would have still been subject to said charges. The tenant purchased the reversion, which was conveyed to trustees, to prevent merger of the term. Subsequently the tenant mortgaged the property in fee, said trustee joining in the conveyance. *Held*, that the charges upon the renewable term were fastened on the reversion also.—*Trumper v. Trumper*, L. R. 8 Ch. 870; s. c. L. R. 14 Eq. 295; 7 Am. Law Rev. 468.

See APPOINTMENT, 2; LEGACY, 5; MORTGAGE, 3.

**CHARITY.**

A testator gave the residue of his real and personal estate to trustees for investment in government securities in their joint names, the interest to be from time to time given to such of the lineal descendants of R. as they might severally need, the trustees to make such provisions as would ensure a continuance of said trust at their decease. *Held*, that the gift was charitable.—*Gillam v. Taylor*, L. R. 16 Eq. 581.

See CONTRACT, 6; MARSHALLING ASSETS.

**CHECK.**—See EVIDENCE.

**CHILD EN VENTRE SA MERE.**—See LEGACY, 11.

**CODICIL.**—See LEGACY, 7.

**COLLATERAL AGREEMENT.**—See LANDLORD AND TENANT.

**COMPANY.**

1. The L. company desired to have 40,000 shares taken in the company. The L. company guaranteed a subscription for said shares, and applied to a bank to discount their notes for £200,000, which the bank agreed to do upon the guarantee of the L. company that until the notes were paid it would leave with the bank an amount equal to the sum remaining due on the notes, and that if the notes were not paid the bank might pay them out of the amount. The £200,000 was carried to

## DIGEST OF ENGLISH LAW REPORTS.

the credit of the L. company, which then provided shareholders, and paid a deposit of £5 per share on the 40,000 shares, thus replacing the £200,000 to the credit of the L. company at the bank. Afterward, the notes not being paid, the bank paid them out of the above sum standing to the credit of the L. company. After an order had been made winding up the L. company, a shareholder filed a bill on behalf of himself and all the other shareholders, except the defendants, against the L. company and the bank to recover said £200,000 for the benefit of the L. company, as having been applied in breach of trust. Bill dismissed.—*Gray v. Lewis. Parker v. Lewis*, L. R. 8 Ch. 1035. See *Gray v. Lewis*, L. R. 8 Eq. 526.

2. The plaintiff, who held shares in a company, sold them to A., who sold them to B. The company was wound up, and a call made upon said shares. B. was unable to pay, and the company proved for the amount of said calls against A., who had become bankrupt, but no part of said amount was paid. The plaintiff paid a sum in settlement of the claim against him for said calls, which he was obliged to pay under the Companies Act. *Held*, that A. was liable to indemnify the plaintiff against calls made after A. had transferred said shares to B., and that said liability was not discharged by A.'s bankruptcy, as it was not provable under § 135 of the Bankrupt Act, 1861.—*Kellock v. Entoven*, L. R. 8 Q. B. 458.

3. If the governing body of a company is so divided that it cannot act together, the court will grant an injunction and appoint a receiver, if necessary, until a meeting has been held by the company, and a proper governing body appointed.—*Featherstone v. Cook. Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 298.

4. By deed of settlement of a company, a shareholder desiring to transfer his shares to any person was to hand in the name of such person to the directors, who were either to accept them as transferees or find some one within fourteen days who would take the shares at market price. Failing to find such person, the person proposed would be entitled to the transfer. The company amalgamated with a corporation without authority under said deed, but with assent of all the shareholders. A year later the former directors of the company executed a deed with the corporation resuscitating the company, and shortly afterward the corporation was wound up. Afterward A. transferred 200 shares to P. for a nominal consideration, and the transfer was approved by the directors. *Held*, that said transfer was invalid.—*Allen's Case*, L. R. 16 Eq. 449.

5. The plaintiff sold fifteen shares to a broker, who gave the name of K. as transferee. K. subsequently turned out to be an infant, the plaintiff was obliged to pay calls, and he filed a bill against the broker for indemnity. The broker answered that he had purchased ninety shares, in which said fifteen were included, for A., B., and C., but that

the shares were left standing in K.'s name, and were not appropriated between A., B., and C. *Held*, that A., B., and C. were severally liable in respect of five shares each of the plaintiff's fifteen.—*Brown v. Black*, L. R. 8 Ch. 939; s. c. L. R. 15 Eq. 363.

See MORTGAGE, 1; PARTNERSHIP, 2; PENALTY.

CONDITION.—See ARBITRATION, 2; MORTGAGE, 2; TRUST, 4; VENDOR AND PURCHASER, 2.

CONDITIONAL LIMITATION.—See SETTLEMENT, 4.

CONDONATION.—See FRAUD.

CONSIDERATION.—See CONTRACT, 4; SETTLEMENT, 1.

CONSTRUCTION.—See APPOINTMENT, 1; CHARITY; CONTRACT, 1, 5; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; FREIGHT; GUARANTEE; ILLEGITIMATE CHILDREN; INSURANCE, 3; MARSHALLING ASSETS; SETTLEMENT, 4.

## CONTRACT.

1. The plaintiff railway company applied to the defendant railway company for a loan, which the defendant agreed to advance upon receiving running powers over the plaintiff's line. The money was advanced and an agreement entered into, whereby (1) the defendant was to have running powers over the plaintiff's line, subject to such by-laws as the plaintiff should make from time to time; (2) the receipts from through traffic to be divided in certain proportions; (3) the defendant to be at liberty to have their own servants at the plaintiff's stations; (4) there was to be a complete system of through booking, whether running powers were exercised or not; (5) the defendant, if using its running powers, to fix the fares, and, if the plaintiff objected, the same to be referred to arbitration; (6) the defendant not to carry local traffic upon the plaintiff's line unless desired so to do, and in such case to receive fifteen per cent. of the local fares; (7) the two companies to send by each other all traffic not otherwise consigned to and from stations on the lines of each other when such lines formed the shortest route; (8) any difference under this agreement to be settled by arbitration. The plaintiff gave the defendant three months' notice of the determination of the agreement. *Held*, that the agreement was not determinable.—*Llanelli Railway and Dock Co. v. London & North-western Railway Co.*, L. R. 8 Ch. 942.

2. The defendants contracted to deliver to the plaintiffs 2000 tons of iron in equal monthly deliveries during the year 1871, payment to be made by acceptance at four months from the 10th of the month following delivery. At several periods before December, 1871, the plaintiffs requested the defendants by letter to deliver no more iron during the then current month, and these requests were acquiesced in by the defendants. In December, the price of iron had risen, and the plaintiffs demanded delivery of the remainder

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of the 2000 tons undelivered, or 1280 tons, and brought action for non-delivery. *Held*, (by KELLY, C. B., and PIGOTT, B.,—MARTIN, B., dissenting), that the plaintiff was not entitled to recover.—*Tyers v. Rosedale & Ferryhill Iron Co.*, L. R. 8 Ex. 305.

3. A corporation on July 17 sold at auction the lease of certain tolls, upon condition that the purchaser should on the fall of the hammer pay a month's advance, and furnish two sureties, who should sign a lease. The purchaser paid the advance, but never furnished the sureties, and on August 4 wrote to the corporation that he could not complete the sale, and asked a return of his advance. The contract of sale was not executed by the corporation under its seal, nor by any person authorized under its seal to sell. The corporation on August 7 adopted said sale, which was entered on the minutes under seal. *Held*, that as there was no contract under the seal of the corporation there was no mutuality; and that the payment of said advance was not such a part performance that the contract might be enforced in equity against the purchaser; and that the ratification of August 7 came too late.—*Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13.

4. A company advertised for offers for the supply of such quantity of certain stores as the company might order during one year. The defendant sent a certain offer, which was accepted. The defendant refused to supply certain of said stores ordered by the company. *Held*, that there was a sufficient consideration for the defendant's promise to supply the goods ordered, although the company was not obliged to order such goods.—*Great Northern Railway Co. v. Willam*, L. R. 9 C. P. 16.

5. The plaintiff sold goods to the defendant, to be paid for according to the written contract in "from six to eight weeks." The sale took place May 1, and the action was begun June 18. The judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks." The jury found that the action had not been brought too soon. *Held*, that the question was properly left to the jury.—*Ashforth v. Bedford*, L. R. 9 C. P. 20.

6. The plaintiff and defendant, both subscribers to a charity, agreed that if the former would vote for an object of the charity the defendant favored, the defendant would at the next election vote for the object of the charity the plaintiff favored. *Held*, that the contract was valid.—*Bolton v. Madden*, L. R. 9 Q. B. 55.

See ARBITRATION, 2; BANKRUPTCY, 2; BROKER; CORPORATION; FRAUDS, STATUTE OF; INJUNCTION; INSURANCE; JURISDICTION; LANDLORD AND TENANT; LEASE; MORTGAGE, 2; PENALTY; RAILWAY, 2; SETTLEMENT, 1, 3.

## CORPORATION.

By the registered articles of association of a mining company it was provided that immediately after incorporation P. enter into an agreement for the purchase of the mine for a

sum in cash and 3200 fully paid-up shares. The vendor of the mine received said shares, and directed that ten of them should be allotted to P. By statute, an agreement concerning paid-up shares must be registered. *Held*, that the articles of association did not constitute an agreement with said vendor of the mine, and that consequently the holder of the shares allotted to him was liable as a contributory.—*Pritchard's Case*, L. R. 8 Ch. 956.

See COMPANY, CONTRACT, 3.

COSTS.—See LIEN, 1.

COVENANT.—See ARBITRATION, 2; PENALTY.

CUMULATIVE LEGACY.—See LEGACY, 7.

CURTSEY, TENANT BY.—See ESTOPPEL.

DAMAGES.—See LANDLORD AND TENANT; STAUTE.

DEATH.—See GUARANTEE, 1; LEGACY, 9.

DECLARATION OF TRUST.—See TRUST, 1.

## DEVISE.

1. A testator in his will directed that his debts should be first paid out of his residuary estate, and then gave a share of the residue to his daughter for life, remainder to her children as tenants in common, remainder to testator's other children. Subsequently to the date of his will the testator executed a settlement in which he recited his agreement to give his daughter £5000, whereof £1000 was to be paid to her intended husband, and £4000 was to be a provision for his daughter, and then covenanted to pay to the trustees of the settlement in his life-time, or within two years after his death, £4000 to be held upon certain trusts. The £1000 was paid to the husband of said daughter. *Held*, that said daughter's share of the residuary estate was deemed to the extent of £4000.—*Coodre v. Macdonald*, L. R. 16 Eq. 258.

2. A testator devised specific estates in trust for each of his children for life, with power in each child to appoint to such person as he or she should marry an annuity not exceeding, in the whole, one-third of the income of the estate devised to him or her for life. He then directed his trustees to hold his residuary estate upon trusts and subject to powers which should correspond with those declared concerning those estates specifically devised. *Held*, that each child had power of appointment of an annuity not exceeding one-third of the income of the specifically devised estate and his share of the residuary estate.—*Cooper v. Macdonald*, L. R. 16 Eq. 258.

3. A testator made specific devises upon trust for each of his children for life, remainder to the children of each tenant for life as tenants in common, with cross-remainders between such children, and failing such issue of the tenant for life, in trust for the testator's other children as tenants in common, or, if there should be only one of his children "then living," in trust for that child and his heirs. There followed bequests of residuary real and personal estate upon trusts to correspond with those above set forth, with a proviso that if any of the testator's children

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should die in his lifetime, leaving children, they should take the share they would have received if their parent had survived the testator. *Held*, that the gift over on failure of issue of a tenant for life was to the testator's children or to their children living at the time when the gift over took effect.—*Cooper v. Macdonald*, L. R. 16 Eq. 258.

4. A testator devised his real estate in strict settlement with a proviso that during the minority of any person who should become tenant for life the trustees of the settlement should accumulate the rents, and should invest such accumulations and interest thereon at certain periods in the purchase of lands to be settled to the same uses. *Held*, that the court could not authorize laying out any portion of said accumulations in necessary repairs and improvements of the estate—*Brownskill v. Caird*, L. R. 18 Eq. 493.

5. A testator gave his real and personal estate in trust to convert both into money and from the proceeds pay certain legacies, and to hold the residue of his said personal estate so converted into money as aforesaid in trust to pay the income to his four natural children until they should respectively attain the age of twenty-one, and when they should attain that age, upon trust to transfer the said residue of his personal estate unto said children in equal shares as tenants in common. *Held*, that under the residuary clause the proceeds of the real estate passed, and that the share of a child who died under twenty-one lapsed and would, as regards the real estate, go to the testator's heirs-at-law, and, as regards the personal estate, go to the testator's next of kin.—*Spenser v. Wilson*, L. R. 16 Eq. 501.

6. A testator devised certain estates upon trust for his daughter E. for life, remainder to the use of E.'s husband W. for life, remainder to trustees for 1000 years to raise portions for younger children of E. and W., remainder, subject to said term to the eldest and other sons of E. in tail male. The testator then directed that in case said E. and W. or either of them should, during their lives or the life of the survivor of them, advance or pay any sum of money for the use of any younger child for whom a portion was provided, then such sum should be taken in full or part satisfaction of the portion to which such child would have been entitled under the will, unless said E. and W. or the survivor of them should direct to the contrary by a deed sealed and attested. E. and W. had several children, of whom one, J., was of weak mind. E., W., and their eldest son covenanted together that if the share of J. devolved upon any of them, they would divide it among the younger children of E. and W. J. died, and her portion devolved upon W., and in accordance with the above covenant passed to the younger children. W. survived his wife, and died, bequeathing shares of his personal estate to his younger children. *Held*, that said younger children's portions taken under the will of the first testator were not to be diminished by the sums received under the above covenant or under W.'s will.—*Cooper v. Cooper*, L. R. 8 Ch. 818.

See APPOINTMENT, 1; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; ILLEGITIMATE CHILDREN; LEGACY; LEX LOCI; MARSHALLING ASSETS; MORTGAGE, 3; SETTLEMENT, 4; TRUST, 3, 5.

DOMICILE.—See LEX LOCI.

EASEMENT.—See PARTY-WALL.

ELECTION.

A testator gave a legacy to his widow for life or until her second marriage, charged upon part of his freehold and copyhold hereditaments, with a direction that she should occupy his mansion-house and enjoy the rents of a portion of the property. The testator then devised his real estate specifically, and gave to his trustees powers of management and leasing. His real estate consisted chiefly of customary lands, out of which his widow was entitled to freebent, but in no instance in these manors had a widow ever been admitted or her freeholds been set out by metes and bounds. *Held*, that the widow was put to her election. *Thompson v. Burra*, L. R. 16 Eq. 592.

ELEGIT.—See PRIORITY, 2.

EMINENT DOMAIN.—See TENANT IN TAIL.

EQUITABLE MORTGAGE.—See MORTGAGE, 2.

EQUITY.—See ARBITRATION, 1; COMPANY, 1, 3; INJUNCTION; RAILWAY, 1; TRUST, 4.

ESTOPPEL.

A tenant by the curtesy of certain estates devised the same to A. for life, remainder to B. in fee. A occupied the premises without interference by the heir entitled to the estates for more than twenty years, and then conveyed to C., who entered after A.'s death. *Held*, that B. was entitled to the estates, inasmuch as A., who had entered into and enjoyed the estates under said will, was estopped from asserting that said will was void and that she, A., had acquired title by twenty years' possession.—*Board v. Board*, L. R. 9 Q. B. 48.

EVIDENCE.

1. Testimony by the maker of a promissory note given to a payee, since deceased, that the note was given merely for the purpose of securing payment of interest upon a sum advanced by the payee, even if legally admissible, should be wholly disregarded.—*Hill v. Wilson*, L. R. 7 Ch. 888.

2. By statute a railway company, with whose line a junction is effected, may erect signals at such junction, and the expense thereof is to be repaid by the company making the junction. Such a junction was made by the defendant with the plaintiff, who, to prove payment for signals erected, stated that a cheque had been sent the person erecting the signals; and it was also proved that said latter person received the cheque and sent a receipt. *Held*, that said receipt was admissible in connection with the other facts to prove payment.—*Carmarthen & Cardigan Railway Co. v. Manchester & Milford Railway Co.*, L. R. 8 C. P. 685.

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## EXECUTORS AND ADMINISTRATORS.

1. Where a person possesses himself of the assets of a testator or intestate without having administered, a bill for an account to the extent of the specific assets he has received will lie against him as executor *de son tort*, though there is no legal representative.—*Cooté v. Whittington*, L. R. 16 Eq. 834.

2. A testatrix bequeathed £1000 to E., and legacies to other persons. By a codicil, after stating that it was her intention to give T. the residue of her estate after paying the legacies, free of all deductions in respect of probate duty or on any other account, she declared her will to be that all the legatees should contribute ratably to her funeral and testamentary expenses in full exoneration of the residue of her estate given to T., and she appointed T. and E. her executors. T., who received all the assets, in consideration of £700, part of the legacy to E., agreed to pay E. an annuity, whose life he knew to be a bad one. *Held*, that the burden was upon T. to prove that his transaction with E. was a fair one; and that the costs of suit must be paid from the residuary estate.—*In re Biel's Estate*. *Gray v. Warner*, L. R. 16 Eq. 577.

3. The plaintiffs supplied goods to an inn-keeper, who subsequently died without having paid for the goods. His administratrix carried on the business and held the goods for fifteen months, when she became bankrupt. *Held*, that the plaintiffs had lost their claim as against the creditors of the administratrix.—*Kitchen v. Ibbetson*, L. R. 17 Eq. 46.

4. An executrix and sole legatee of a testator opened an account with a bank as "executrix of G.," the testator. Having overdrawn her account, she deposited with the bank a picture belonging to the testator's estate as security for present and future advances. Before said account was opened a decree had been made in a creditors' suit for the administration of the testator's estate, but no receiver was appointed nor an injunction granted to prevent the executrix from dealing with the assets. The bank had no notice of said suit. *Held*, that the pledge of the picture was valid.—*Berry v. Gibbons*, L. R. 8 Ch. 747.

## FALSE REPRESENTATION.

The plaintiff brought an action against the defendant for advertising that he had a certain farm to let, when in fact he had no authority to let the same, in consequence of which the plaintiff incurred expense to no purpose, in ascertaining the value of the farm with a view to leasing it. *Held*, that the above advertisement amounted to a false representation, upon which an action would lie.—*Richardson v. Silvester*, L. R. 9 Q. B. 84.

FOREIGN CONTRACT.—*See JURISDICTION.*

## FRAUD.

Condonation of fraud. *See Moxon v. Payne*, L. R. 8 Ch. 881.

## FRAUDS, STATUTE OF.

The defendant verbally promised the mother of his illegitimate children to give her £300

per annum so long as she should maintain the children. The plaintiff brought an action to recover two years' unpaid arrears. *Held*, that said agreement need not be in writing under the Statute of Frauds, § 4.—*Knowlman v. Bluet*, L. R. 9 Ex. 1.

*See CONTRACT, 2; INSURANCE, 4; LANDLORD AND TENANT.*

FRAUDULENT PREFERENCE.—*See BANKRUPTCY, 1.*

FREENENCH.—*See ELECTION.*

## FREIGHT.

T. accepted bills of exchange against a bill of lading of a cargo of rice. By the bill of lading the rice was to be delivered to T. or his assigns; "freight for the said goods, £4 per ton of 20 cwt. net delivered, with primage and average accustomed." The shipper of the rice was also the owner of the vessel. While the vessel was on the voyage, said shipper and owner obtained advances from C., to whom he assigned the freight of the vessel on said voyage as security. *Held*, that C. was entitled to freight as above; and that under the bill of lading the rice was deliverable only on the freight being paid.—*Waguelin v. Cellier*, L. R. 6 H. L. 286.

*See BILL OF LADING.*

## GUARANTEE.

1. A guarantee was given, determinable on six months' notice. The guarantor died, leaving the debtor on whose behalf the guarantee was given his executor. The creditor, with knowledge of the death of the guarantor, and that he left but little personal estate, made further advances to the above debtor. *Held*, that the advances made subsequent to the death of the guarantor could not be satisfied out of the real estate of the guarantor. *Semble*, that the guarantee was not determined by the death of the guarantor.—*Harris v. Fawcett*, L. R. 8 Ch. 866; a. c. L. R. 15 Eq. 311; 8 Am. Law Rev. 100.

2. The plaintiffs declined to sell certain goods to D. without an engagement by the defendants to become responsible for their value. The defendants telegraphed agreeing to be answerable for said goods, and also sent a letter, in which they said, "Having every confidence in D., he has but to call on us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you." *Held*, that said letter was a continuing guarantee.—*Nottingham Hide Co. v. Bottrill*, L. R. 8 C. P. 694.

HUSBAND AND WIFE.—*See ACTION; LEGACY, 9.*

## ILLEGITIMATE CHILDREN.

The testator's daughter had married the husband of her deceased sister. The testator devised estates "to my son-in-law J. C.," and "to my daughter M., wife of said J. C.," and also "to the children or child of my said daughter M. C." The testator's daughter had two children by J. C. living at the date of the will. *Held*, that said illegitimate children of M. C. were sufficiently designated

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in the will and took under the devise.—*Hill v. Crook*, L. R. 6 H. L. 265: s. o. L. R. 6 Ch. 311; 6 Am. Law Rev. 91.

See DEVISE, 5; SETTLEMENT, 1.

INDENTURE.—See AMALGAMATION.

INFANT.—See COMPANY, 5.

INJUNCTION.

By the terms of a contract whereby the defendant agreed to furnish the plaintiff's house, the defendant was to obtain an architect's approval in writing before any money was payable. The defendant brought an action at law for a larger sum than the architect approved, and the plaintiff brought this bill to restrain the action. *Held*, that there was a good defence at law to the action, and no equity to sustain the bill.—*Baron de Weymes, v. Melhier*, L. R. 16 Eq. 554.

See ARBITRATION, 1; COMPANY, 3; JURISDICTION; TRADE-MARK.

INSOLVENCY.—See LEGACY, 5; LIEN, 2.

INSURANCE.

1. The A. Insurance Company sold its business to the B. Insurance Company in October, 1868, the B. company to undertake the liabilities upon existing policies, and, if required, to issue new policies in exchange. The A. company was to be wound up voluntarily, and its assets were to be collected by the B. company and distributed among the creditors of the A. company. E., the assignee of a policy in the A. company on the life of another party, after the date of said sale paid the annual premium to the A. company, who received the same as agent of the B. company, as authorized by the latter. On December 31, E. sent the policy to the B. company for endorsement, and on Jan. 21, 1869, the insured died. In March, the B. company resolved to pay E.'s claim, and a memorandum under seal was endorsed on the policy, declaring that the capital of the B. company should alone be liable for the sum insured by the policy, and that E.'s claim was admitted payable. In June, the B. company cancelled the contract of sale of October, 1868, in consequence of the A. company having failed to comply with its terms, and in November an order was made for winding up the B. company. *Held*, that there was a good consideration for said memorandum, and a complete novation of said contract of insurance, and that E. was entitled to recover from the B. company the sum due under the policy.—*In re United Ports and General Insurance Co., Evans' Claim*, L. R. 16 Eq. 354.

2. The plaintiffs, cotton brokers in London, received advice from B. that he had shipped cotton to them and had drawn upon them at six months' sight for £3000 on account of that shipment, and the plaintiffs (according to their custom) declared the cotton valued at £5000 upon an open policy "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all" with the defendant, May 28, intending to insure B. and

themselves. The plaintiffs accepted the bills "against shipping documents" for said cotton May 21. The cotton was lost at sea June 11. The plaintiffs afterward paid said bills and received the bills of lading for said cotton. *Held*, that the plaintiffs were entitled to recover said £3000, being the amount of their advances; and *held* (by BOVILL, C. J., and DENMAN, J.), that the plaintiffs were entitled to recover said £5000, being the whole amount insured. (KEATING and BRETT, JJ., *contra*).—*Ebsworth v. Alliance Marine Insurance Co.*, L. R. 8 C. P. 596.

3. The plaintiff insured silks "at and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London via Marseilles and [or] Southampton, and whilst remaining there for transit . . . and in the good ship called the—steamers or steamer per overland, or via Suez Canal." The perils insured against included arrests, restraints, and detentions of all kings, princes, and people of what nation, condition or quality soever, and all other perils, losses, and misfortunes that shall come to the detriment of said goods. The policy contained a memorandum that it was agreed that said goods should be shipped by the M. or certain other steamers, only. Goods were never in the ordinary course of business carried to London via Marseilles except by the M. steamers, which stopped at Marseilles, and the M. steamer company always sent such goods overland through France and thence to London, and this was well known among underwriters. Said silks were transmitted by the M. steamers from Shanghai to Marseilles, and thence through France via Paris. In Paris the goods were detained in consequence of the city being besieged and surrounded by the Germans. After the silks had been detained a month the plaintiff gave notice of abandonment to the underwriter. *Held*, that the policy covered the whole journey from Shanghai to London, including the overland transit through France; and that said detention in Paris was in consequence of a "restraint of princes," and that the plaintiff was entitled to abandon and recover as for a total loss.—*Bodocanachi v. Elliott*, L. R. 8 C. P. 649.

4. An insurance company in Liverpool employed E. as their agent in London to accept risks and receive premiums there. The plaintiff employed P. to effect insurance for him, and P. prepared a slip, which was initiated by E. for said company, and transmitted the same day to Liverpool. The company received the slip, and held it for some time, and in the meantime E. received a cheque payable to the company's order for the amount due the company for premium and stamp duty, and by virtue of his authority indorsed the cheque and received the money. The goods insured were lost by the perils insured against, and the company refused to execute a policy. *Held* (by QUAIN and ARCHIBALD, J. J.), that no action would lie; (by BLACKBURN, J.) that accepting the initial slip amounted to a contract to either properly and diligently prepare a policy, or to return the slip, and without delay inform the plaintiff

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that the company would not execute a policy.  
*Fisher v. Liverpool Marine Insurance Co.*, L. R. 8 Q. B. 469.

INTEREST.—See LEGACY, 1, 2.

## JURISDICTION.

A ship-owner at Hamburg agreed to sell a vessel to H., an Englishman, resident and domiciled at Hamburg, possession to be given upon the delivery of the cargo after arrival from the voyage in which the vessel was then engaged, and deductions to be made for damage above wear and tear. The master of the vessel, who was authorized to complete the sale, arrived in England and discharged his cargo, but refused to there deliver the vessel to H. unless paid the full price, and refused to allow a survey to enable H. to ascertain what damage the vessel might have sustained. H. filed a bill for specific performance, and for restraining the vessel from leaving port, and served a copy of the bill upon said master. *Held*, that the service was sufficient, and that the court had jurisdiction, and would restrain the vessel from removing from said port. Injunction granted.—*Hart v. Herwig*, L. R. 8 Ch. 860.

See ARBITRATION, 1.

JURY.—See CONTRACT, 5.

## LANDLORD AND TENANT.

The defendant, before leasing an estate, promised B. that he would kill down the game upon the estate, and would not let the game during the lease. B. took the lease, but the lessor then let the game, and did not kill it down. B.'s crops were in consequence damaged by the game. B. also lost sheep, which were poisoned by browsing upon yew-trees, the branches of which extended over the lessor's fence so as to be within reach, and other sheep, by their feeding upon yew-tree clippings, thrown by the lessor's gardener upon B.'s land; he also lost cattle by their getting at yew-trees upon the lessor's land by reason of the insufficient fence upon the lessor's land. After this the lessor died. *Held*, that B. was entitled to recover for the damage to his crops caused by the defendant's failure to keep his collateral agreement to kill down the game; that he could not recover for the loss of his sheep, as for that injury B. had only a personal action, if any, which died with the lessor, and that he could not recover for the loss of the cattle, as there was no obligation upon the lessor to maintain a fence between his and his lessee's land.—*Erskine v. Adeane*, L. R. 8 Ch. 756.

LAPSE.—See DEVISE, 5; LEGACY, 8.

## LEASE.

The owner of a ten-year lease agreed in writing to let the property to K., and not to give him notice to quit so long as he paid the rent when due, having previously verbally agreed to let the premises to K. for any term of years not exceeding his own. A railroad company contracted to purchase K.'s interest in the premises, which he described as any term at tenant's option, but not beyond said owner's term. The company subsequently

denied that K. had proved title as alleged. *Held*, that K. had an interest in said premises, and was entitled to the purchase-money.—*In re King's Leasehold Estates. Ex parte East of London Railway Co.*, L. R. 16 Eq. 521.

See CHARGE; LEX LOCI.

[To be continued.]

## REVIEWS.

AN EPILOGUE OF LEADING COMMON LAW CASES, WITH SOME SHORT NOTES THEREON, chiefly intended as a guide to "Smith's Leading Cases." Second edition. By John Indermaur, Solicitor, Clifford's Inn, and Prizeman Michaelmas Term, 1872. London: Stevens & Haynes, Bell Yard, Temple Bar.

This is at once an abridgement of and index to "Smith's Leading Cases."

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The idea of such a publication is a good one. The result has been that a second edition has been called for in little more than a year from the first edition. Some of the notes in this edition have been enlarged, but only one principal case has been added, and that is *Hadley v. Buzendale*, 9 Ex., 341, on the subject of "Damages." Reference is made to *Lumley v. Gye*, 22 L. J., N. S., Q. B., 463; *Cary v. Thames Iron Works Co.*, L. R., 3 Q. B., 186, and other well-known cases.

The whole volume is only 80 pages. The book is indeed *multum in parvo*, and its utility is proved by its success. A book like this is in truth "a labour-saving machine," and in this age, when time is money, must be readily patronized by barristers, solicitors and students-at-law.



## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

We clip the following from one of our country newspapers :

"In pursuance of the statutes and in accordance with the by-law in such case made and provided, public fairs will be held [among other places] at Ballieroy, on the first *Tuesday* of January, April, July and October, except said fair day fall on *Sunday*, then on the *Monday* following." (*Sic*)

While it is impossible not to admire the piety which prompted the addition of the proviso, it must be admitted that a superfluity of caution is displayed. Whether this perspicuity as to time is owing to the combined wisdom of our legislators, or whether the peculiarity arises, as the name of the locality would seem to imply, from an Irish atmosphere redolent of "bulls," we are not informed.

The *Albany Law Journal* states that "a committee of the House of Commons having been appointed to investigate the charges preferred against Dr. Kenealy, counsel for the Tichborne Claimant, Mr. Whalley, M.P., demands that a similar committee be appointed to investigate charges against Mr. Hawkins, Q.C., prosecuting attorney." Our cotemporary has apparently a mania on the Tichborne question, and loses no opportunity of airing its spleen against Chief Justice Cockburn, his associates, the counsel for the Crown and the Jury, for the parts they took in the punishment of an unmitigated scoundrel. The mode of dealing with professional matters in England, is a matter upon which the *Journal* is apparently profoundly ignorant, and it seems to prefer that blissful state.

A return to the House of Commons, in England, shows the amount expended upon the prosecution in the case of *Regina v. Castro, otherwise Orton, otherwise Tichborne*, and the probable amount still remaining to be paid out of the vote of Parliament for "this service." The probable cost of the trial is stated at 55,315*l.* 1*7s.* 1*d.*, of which 49,815*l.* 1*7s.* 1*d.* had been paid up to the 11th ult., and on May 11, 5,500*l.* remained unpaid. In 1872-3 counsel's fees were 1,146*l.* 16*s.* 6*d.*, and in 1873-4 counsel's fees were 22,495*l.* 18*s.* 4*d.* The jury were paid 3,780*l.*, and the shorthand writers 3,493*l.* 3*s.* The other expenses were witnesses, agents, &c., and law stationers and printing. Of the sum to be paid, 4,000*l.* is for the Australian and Chili witnesses. It also appears from the preamble of the Tichborne and Doughty Estates Bill, which has been read a first time in the House of Lords, that the

expenses of the litigation occasioned by the Claimant's proceedings, and payable by the present baronet, or, in the event of his death during minority, by the family out of the estates, have amounted already to nearly 92,000*l.*

As a Judge, Lord Avonmore had one great fault: He was apt to take up a first impression of a cause, and it was very difficult afterwards to obliterate it. Curran, who often suffered by the Judge's habit of anticipation, once took the following method of rebuking him for it. They were to meet at dinner, and Curran, contrary to his usual custom, came in late, and appeared to be in a state of the deepest agitation. "Why, Mr. Curran, you have kept us a full hour waiting dinner for you," grumbled out Lord Avonmore. "Oh, my dear Lord, I regret it much: you must know it seldom happens, but I've just been witness to a most melancholy occurrence." "My God! you seem terribly moved by it—take a glass of wine. What was it?—what was it?"—"I will tell you, my Lord, the moment I can collect myself. I had been detained at Court—in the Court of Chancery—your Lordship knows the Chancellor sits late." "I do, I do—but, go on." "Well, my Lord, I was hurrying here as fast as ever I could—I did not even change my dress—I hope I shall be excused for coming in my boots!" "Poh, poh—never mind your boots: the point—come at once to the point of the story." "Oh, I will, my good Lord, in a moment. I walked here—I would not even wait to get the carriage ready—it would have taken time, you know. Now there is a market exactly in the road by which I had to pass—your Lordship may recollect the market—do you?" "To be sure I do—go on, Curran—go on with the story." "I am very glad your Lordship recollects the market, for I totally forgot the name of it—the name—the name—" "What the devil signifies the name of it, Sir—it's the Castle Market." "Your Lordship is perfectly right, it is called the Castle Market. Well, I was passing through that very identical Castle Market, when I observed a butcher preparing to kill a calf. He had a huge knife in his hand—it was as sharp as a razor. The calf was standing beside him—he drew the knife to plunge it into the animal. Just as he was in the act of doing so, a little boy about four years old—his only son—the loveliest little baby I ever saw—ran suddenly across his path, and he killed—" "The child! the child! the child!" vociferated Lord Avonmore. "No, my Lord, the calf," continued Curran very coolly; "he killed the calf, but—your Lordship is in the habit of anticipating."

## NEW TARIFF OF FEES TO DIVISION COURT OFFICERS.

**NEW TARIFF OF FEES TO DIVISION COURT OFFICERS.****SCHEDULE OF CLERK'S FEES.**

|  | \$ cts. |
|--|---------|
| Receiving claim, numbering and entering in Procedure Book.....   | 0 15    |
| Issuing Summons with necessary notices or warnings thereon, or Judgment Summons where claim does not exceed \$20.....  | 0 30    |
| where claim exceeds \$20 and does not exceed \$60.....   | 0 40    |
| where claim exceeds \$60.....  | 0 50    |
| Copy of Process, of claim, or set off or other paper required for service or transmission to Judge, each.....  | 0 20    |
| Summons to witness, with any number of names thereon.....  | 0 10    |
| For every copy to serve.....   | 0 5     |
| Receiving and entering Bailiff's return to process or Judge's order.....   | 0 10    |
| Entering notice of set off, plea of payment, or other defence, requiring notice to the Plaintiff, or notice of admission as to payment.....  | 0 20    |
| Taking Confession of Judgment.....   | 0 10    |
| Drawing every necessary affidavit and administering oath.....  | 0 25    |
| Every notice required to be given by Clerk to any party to a cause or proceeding, or to the Judge in respect to the same, and mailing.....   | 0 10    |
| Entering every Judgment, or order made at the hearing, or final order made by the Judge, or final judgment entered by the Clerk.....   | 0 40    |
| Summons for each jurymen, when called by the parties.....  | 0 10    |
| (Only 25c. in all to be allowed for a Judge's Jury.).....  |         |
| Order of Reference, attaching order, or other order drawn and entered by the Clerk.....  | 0 15    |
| Transcript of Judgment (under secs. 139 or 142).....   | 0 25    |
| Every Writ of Execution, Warrant of Attachment or Warrant for arrest of delinquent.....  | 0 40    |
| Every Bond, when necessary, including affidavit of Justification.....  | 0 50    |
| For necessary entries in the debt attachment book in each case (in all).....   | 0 20    |
| Transmitting papers for service to another Division or to Judge, on application to him, including necessary entries, but not postages.....   | 0 20    |
| Receiving papers from another Division for service, entering same, handing to the Bailiff, receiving his return, and transmitting same, (if return made promptly, not otherwise,)..... | 0 30    |
| Search by a person not party to the suit or proceeding to be paid by the appli-  |         |

cant, 10c. ; search by party to the suit or proceeding where same is over one year old..... 0 10

(No fee is chargeable for a search to a party to the suit or proceeding, if the same is not over one year old.)

**SCHEDULE OF BAILIFF'S FEES.**

|  |      |
|--|------|
| Service of Summons, order, or other process, on each person (except Summons to witness, and Summons to jurymen,) where claim does not exceed \$20.....   | 0 20 |
| where claim exceeds \$20 and does not exceed \$60.....   | 0 30 |
| where claim exceeds \$60.....  | 0 40 |
| Service of Summons on witness or jurymen, or service of notice.....  | 0 10 |
| Taking confession of judgment, and attending to prove.....   | 0 10 |
| Enforcing every writ of execution, warrant of attachment, or warrant against the body, each, where claim does not exceed \$20.....   | 0 40 |
| where claim exceeds \$20 and does not exceed \$60.....   | 0 60 |
| where claim exceeds \$60.....  | 0 80 |
| (Executing Summons in replevin, including service on defendant, same charge.)  |      |
| Every mile necessarily travelled to serve summons or process, or other necessary papers, or in going to seize on a writ of execution, where money made or case settled after levy.....   | 0 11 |
| (In no case is mileage to be allowed for a greater distance than from the Clerk's office to the place of service or seizure.)  |      |
| Mileage to arrest delinquent under a warrant to be at 11 cents per mile ; but for carrying delinquent to prison, including all expenses and assistance, per mile.....  | 0 20 |
| Every schedule of property seized, attached or replevied, including affidavit of appraisal, when necessary, not exceeding \$20.....  | 0 30 |
| Exceeding \$20 and not exceeding \$60.....   | 0 50 |
| Exceeding \$60.....  | 0 75 |
| Every Bond, when necessary, including affidavit of justification.....  | 0 50 |
| Every Notice of Sale not exceeding three, under execution or under attachment, each.....   | 0 15 |
| There shall be allowed to the Bailiff, for removing or retaining property seized under execution or attached, reasonable and necessary disbursements and allowances, to be first settled by the Clerk, subject to appeal to the Judge. |      |
| There shall be allowed to the Bailiff five per cent. upon the amount realized from the sale of property under any execution, but such per centage not to apply to any overplus thereon.  |      |

Dated at Toronto, this 26th day of June, 1874.

## LAW SOCIETY—EASTER TERM, 1874.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, EASTER TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

JOSEPH ROBERT TREHURN.  
 PETER MCGILL BARKER.  
 CHARLES ROBERT RYERSON.  
 ALFRED SERVOS BALL.  
 CHARLES EDGAR BARBER.  
 FRANK D. MOORE.  
 HARRUEL MADDEN DEROCHER.  
 CLARENCE WIDMER BALL.  
 E. GEORGE PATTERSON.  
 GEORGE LEVACK B. FRASER.

These gentlemen are called in the order in which they entered the Society and not in the order of merit.

Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

JOSEPH JAMES GORMULLY.  
 E. GEORGE PATTERSON.  
 THOMAS HORACE MCGUIRE.  
 CHARLES ROBERT RYERSON.  
 DAVID ROBERTSON.  
 GEORGE LEVACK B. FRASER.  
 A. BASIL KLEIN.  
 ALFRED SERVOS BALL.  
 JOSIAH R. M'CALL.  
 ARTHUR LYNDBURST COLVILLE.  
 CLARENCE WIDMER BALL.  
 D. ELLIS MCMILLAN.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

GEORGE ROBERT GRASSETT.  
 JOHN MAXWELL.  
 WILLIAM SETON GORDON.  
 JAMES CRAIG.

*Junior Class.*

FRANK FITZGERALD.  
 DUNCAN DENNIS RICHARDS.  
 DAVID HALDANE FLETCHER.  
 ISAAC CAMPBELL.  
 JAS. W. HOLMES.  
 NICHOLAS DUBOIS BUCK.  
 ARTHUR BRATTY.  
 JOHN SANDFIELD McDONALD.  
 JOHN ARTHUR PATRICK McMAHON.  
 WILLIAM JAMES LAVERY.  
 JOHN LEWIS.  
 ANDREW HALLIE HUNTER.  
 JOHN JACOB WHEELER STONE.  
 JOHN GIBSON CURELL.  
 MAXFIELD SHERPARD.  
 GEORGE ALBERT FLETCHER ANDREWS.  
 WALTER JAMES READ.  
 THOMAS WILLIAM PHILLIPS.  
 NATHANIEL MILLS.  
 JOHN MALCOLM MUNRO.  
 JOHN JOSKIN BLAKE.  
 WM. EDGAR STREYENS.  
 CHARLES ROBERT MACDONALD.  
 COLIN SCOTT RANKIN.  
 CHARLES MICHAEL FOLEY.  
 JOHN GREGORY KELLY.  
 JOHN ROSS MCCOLL, and  
 ERNEST JOSEPH BRAMMONT as an articled clerk.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (O S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 38, Statutes of Canada, 29 Vic. c. 23, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 42.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
 Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR AUGUST.

1. Sat....*Lawmas*. Slavery abolished in British Empire, 1834.
2. SUN...*9th Sunday after Trinity*.
5. Wed...First Atlantic Cable laid, 1858.
6. Thurs..*Transfiguration*.
8. Sat....Cand. for Attorney to leave articles with Sec. of Law Soc. (28 V. c. 21, s. 5.)
9. SUN...*10th Sunday after Trinity*.
10. Mon...Battle of Montmorenci, 1759.
11. Tues...Prim. Exam. of Law Students and Articled Clerks.
13. Thurs..Last day for service for County Court York.
14. Fri....Last d. for Co. Clk's. ret. to Local Clks. (32 V. c. 36, s. 77).
15. Sat....Last day for Local Clerks to deliver voters' lists to Clk. of Peace (32 V. c. 21, s. 7.)
16. SUN...*11th Sunday after Trinity*.
17. Tues...Intermediate Examinations begin.
19. Wed...Last d. for set. down and giving not. of re-h. in Chancery.
20. Thurs..Atty's. ex. Cands. for call to pay fees and leave papers.
21. Fri....Long Vac. ends. Exam. for call to the Bar H. R. H. the Prince of Wales landed at Quebec, 1860.
22. Sat....Examination for Call with Honours.
23. SUN...*12th Sunday after Trinity*.
24. Mon...Trin. T. begins. Last day to deel. for Co. Court York.
25. Wed...Prince Albert born, 1819.
27. Thurs..Rehearing Term in Chancery begins.
28. Fri....Last d. for not. trial in Sup. Ct. case for Co. Ct. York.
30. SUN...*13th Sunday after Trinity*.

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THE

Canada Law Journal.

Toronto, August, 1874.

Mr. Whalley has elicited the information, in the House of Commons, that the total cost of the prosecution of Arthur Orton was £55,315 17s. 1d. The amount of counsel fees was £11,450; the shorthand writers received £3,493, and the jury £3,780.

A London solicitor, of twenty years' standing, was lately suspended from practice for a term of six months, and condemned in costs, by Jessel, M. R., upon an application to strike him off the rolls, for making an interlineation in an affidavit after it was sworn: *Erskine v. Adeane*, 18 Sol. Jour. 573.

The *Albany Law Journal* has an article on the legal aspects of the woman-praying temperance crusade, wherein the conclusion is arrived at that the whole demonstration, in law, amounts to a nuisance in restraint of trade. While not sympathising with the absurdities of the movement, surely our contemporary goes rather far the other way. No doubt Demetrius, the silversmith at Ephesus, made much the same argument against one Paul, but many people have since thought the apostle was substantially right.

Touching the benefits and disadvantages of cremation, one of the New York papers makes a forcible objection against the adoption of such a practice. It observes that, in nine cases out of ten, the crime of poisoning is detected by a chemical analysis of the contents of the stomach

## LAW SOCIETY.

after interment. So long as the body remains undecayed the poisoner is not safe. But let the corpse be burnt into a handful of white ashes, and thereby, with the disappearance of the danger of detection, the chances of impunity for the murderer are multiplied.

We have delayed the issue of this number to publish the very important decisions of the Election Court in the North Victoria, Carlwell, and North Simcoe Cases. These reports will be invaluable to those concerned in the numerous Election Petitions to be tried this autumn, as they decide most of the points of importance likely to arise. We have been requested to strike off an extra number of copies, for the convenience of the profession, which can be had from the publishers. As these cases will not appear elsewhere, an early application would be desirable. Some others will follow, and we shall continue, as heretofore, to make Election Reports a specialty of this Journal.

## LAW SOCIETY.

## EASTER TERM—37th Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:—

*Monday, 18th May.*

The several gentlemen whose names are published in the usual lists were called to the Bar, received certificates of fitness, and were admitted as Students of the Law.

The Treasurer reported the result of the Law School Examinations, as follows:

## JUNIOR CLASS.

|                 |         |            | Maximum 1,000. |
|-----------------|---------|------------|----------------|
| J. D. Lawson,   | allowed | 18 months, | 870 Marks.     |
| R. W. Evans,    | "       | 18 "       | 851 "          |
| John Bruce,     | "       | 18 "       | 850 "          |
| Alex. Ferguson, | "       | 12 "       | 799 "          |

All the above passed the Junior Class last year.

|                |         |           |            |
|----------------|---------|-----------|------------|
| W. M. Hall,    | allowed | 6 months, | 802 Marks. |
| G. A. Cooke,   | "       | 6 "       | 795 "      |
| M. E. O'Brien, | "       | 6 "       | 783 "      |
| James Pearson, | "       | 6 "       | 765 "      |

## JUNIOR CLASS.

Maximum 1,000.

|                  |         |            |
|------------------|---------|------------|
| Matthew Wilson,  | passed. | 867 Marks. |
| D. W. Clendenan, | "       | 847 "      |
| R. Pearson,      | "       | 834 "      |

Certified by President of Law School.

The Treasurer reported the result of the Intermediate Examinations.

The Report of the Examining Committee was read and adopted.

Mr. Evans was appointed Examiner for next Term, and his fees for this Term were ordered to be paid.

Ordered that any Student or Clerk passing the Law School, and being allowed any diminution of his period of Studentship or service thereon, shall also be allowed his final Examination in the Law School as an Intermediate Examination, and in lieu thereof.

Mr. Read gives notice for the last Friday in this Term, of a By-law to establish a Widows' and Orphans' Fund.

*Saturday, 23rd May.*

This being the day for the Election of Treasurer, according to the provisions of the Statute of Ontario, 34 Vict. cap 15, and no quorum being present, the Hon. J. H. Cameron, the present Treasurer, continues Treasurer, by law, for the ensuing year.

*Friday, 5th June.*

The Chairman of the Reporting Committee drew the attention of Convocation to the advisability of having the reports printed on better paper than that at present used.

Referred to the Finance Committee for their report on the Ways and Means in next Term.

Ordered that the Editor-in-Chief do cause certain Chamber reports, left unfinished by Mr. Cooper, to be printed.

## CURIA CANADENSES.

Mr. E. G. Patterson's petition to be allowed his examination for certificate of fitness passed last Term, in advance of the expiration of his articles, which have eighteen months to run, was refused.

Mr. Read, pursuant to notice, introduced a by-law to make provision for the widows and orphans of members of the Society. Read a first time, and referred to a special committee of five members, to report next Term; such committee to consist of Messrs. McKenzie, McLennan, Martin, Vankoughnet, and Read.

Ordered that the order of Michaelmas Term, 1871, respecting Attorneys' Certificates, be rescinded, and that the Secretary shall provide a book to keep a record of the certificates taken out and the names of Attorneys who have not taken out certificates in this and each succeeding year, and that he lay before Convocation, on the first Tuesday of each Easter Term, a list of Attorneys who have not taken out certificates for the current year.

The Examining Committee for next Term will be Messrs. Read, Armour, Gamble, Vankoughnet, and Patton.

## SITTINGS AFTER TERM.

*Tuesday, 30th June.*

On the application of Mr. John Wright, that Convocation would prescribe the examination to be passed by him, under the Statute, 37 Vict., ch. 103, enabling the Law Society to call him to the Bar:

Ordered that Mr. Wright may be admitted to the Bar on passing a *viva voce* examination before the Convocation, without any written examination by the Examiners.

J. HILLYARD CAMERON,  
*Treasurer.*

## CURIA CANADENSES.\*

In this age of the world, the number of facts which ought to be retained in the memory of any one who pretends to be educated is so enormous, that those who seek to convey information in an attractive guise, which makes the task of remembering less painful, are justly looked upon as benefactors of the human race. We certainly owe a great deal to those wise teachers who have attempted to "popularize" various branches of learning: to the scientists, metaphysicians, lawyers and theologians who have instituted the plan of dressing their subjects in the sprightly style which is essential to the modern magazine article. One of the most useful forms in which the desire to impart information to the many has taken shape, though by no means a novel one, is the clothing of dry and unromantic facts in the garb of poetry. There is little excuse for ignorance when the kings of England, the lengths of the months, the whole science of chemistry, nay even a portion of the laws of the land are reduced to poetry, which requires no effort to learn and remember. One of the most benevolent ideas ever conceived was that of Coleridge, who, sympathising keenly with the sufferings of youth in striving to master the Elements of Euclid, proposed to convert that useful work into verse. Unhappily the idea, like too many of that great man's ideas, was never carried into effect, and he has only left us a metrical version of the 1st Proposition of the 1st Book, to make us regret that the rest knew not the hand of the bard. What can be more admirable than this

\* *Curia Canadenses*; or, The Canadian Law Courts: being a poem describing the several Courts of Law and Equity, which have been erected from time to time in the Canadas, with copious notes, explanatory and historical, and an appendix of much useful matter. By Plinius Secundus. Toronto: H. & W. Rowse, King Street. 1843.

## CURIÆ CANADENSES.

commingling of moral reflection with mathematical statement?

"The unanimous three,

CA and BC and AB,

All are equal, each to his brother,

Preserving the balance of power so true:

Ah! the like would the proud Autocratix\* do!

At taxes impending not Britain would tremble,

Nor Prussia struggle her fear to dissemble," etc.

To keep to what concerns ourselves more especially, the purely legal, we know that Lord Coke did not disdain the aid of poetry to make his teachings generally acceptable. The popularity of his reports is said to have been much increased by the publication of a metrical abstract of the points determined, distinguished by the name of the plaintiff in each case. Thus:

"HUBBARD.—

If lord impose excessive fine,

The tenant safely payment may decline.

[4 Rep., 27.]

CAWDRY.—

'Gainst Common Prayer, if parson say

In sermon aught, bishop deprive him may."

[5 Rep., 1.]

The greatest judges, when at a loss for an authority in prose, have referred to an authority in verse in proof of the soundness of their law. Witness the quotation of Lord Mansfield in a libel case:

"Sir Philip well knows

That his innuendoes,

Will serve him no longer

In verse or in prose:

For twelve honest men have decided the cause,

*Who are judges of fact, though not judges of laws."*

According to Lord Campbell, however, he misquoted the last line.

We seriously commend to the attention of the authors of the new Canadian Digest, the merits of a metrical abstract such as that of Lord Coke's. We do not doubt their competence to give to the profession a poetical digest of the legal principles decided in the cases in conjunction with the prosaic one now issuing from

the press. When such a scheme is carried out, we see for the lawyer of the future a flowery, instead of a thorny, path to the bench, the possibility, without travelling beyond his professional studies, of gaining a reputation in social circles as a sayer of good things and a ready quotor of poetry, and in the courts the pleasure of listening to and taking part in such a feast of reason and a flow of soul as we sad apprentices can only dream of.

One of the best known of the rhyming descriptions of courts of law and their denizens is Christopher Anstey's "Pleader's Guide." Though it contains many hard hits at the law and lawyers, it also contains much accurate information as to the cumbrous procedure and technical rules of pleading of the last century. It was Anstey's poem which first suggested to the mind of "Plinius Secundus" to compose the work the name of which heads this article, and which is the occasion of the foregoing remarks. Probably few of our readers are familiar with "Curiae Canadenses." It is spoken of in that valuable curiosity shop, in which are stored so many interesting relics of the past—"Toronto of Old." Through this book we first became aware of the fact that a poetical description of the Canadian law courts, as they were thirty years ago, was in existence. We immediately instituted a quest for this rare work; but search for a long time proved unavailing. Many obliging booksellers offered us Morgan's "Biographies of Celebrated Canadians," as the nearest they could come to it, but we explained gently that "Curiae Canadenses" did not mean "Curious Canadians," and went on our way. By the kindness of the author of "Toronto of Old," we have procured a copy, and propose briefly to notice its contents, as one of the few archaeological records of early legal affairs we have.

Those who hope to find in "Curiae Canadenses" a lively sketch of the lead-

\* Empress of Russia.

## CRIME CANADENSES.

ing lawyers of thirty years ago, with little bits of gossip and anecdote, which though alight and common-place to the men of the day to which they relate, are so wonderfully interesting to their successors, will be, as we were, disappointed. In truth the interest of the work does not flow from its literary merit. It bears no resemblance to the famous *Rolliad*, from which Lord Campbell draws so many illustrations in his "Lives." Instead of this we have a catalogue of law courts and law officers, as matter of fact as the list of ships in the *Iliad*. The book is strictly what it professes to be, a description of "the several Courts of Law which have been erected from time to time in the Canadas, with copious notes, explanatory and historical, and an appendix of much useful matter." The notes and appendix are copious, and bear about the same proportion to the text as the notes in "Walkem on Conveyancing," bear to the original work. They contain, as the title promises, much useful information as to the judicial districts into which the Canadas were divided in 1843 (they were much more numerous in Upper Canada then than now), the various courts, the Acts by which they were constituted, their jurisdiction, their judges, and so forth. The book was published when public indignation on account of the "Rebellion" had not subsided, and when the same feeling prevailed in Toronto as when Charles Dickens visited the city and found the people "red-hot Tories." We are of course treated to an account of the rebellion, enlivened with a great many expressions of pious horror at the fiendish conduct of the "conspirators." Our author, though an English barrister, and but a short time resident in the country, was strongly tintured with Canadian conservatism. We are proud to find that the law did its duty nobly in the trying emergencies of the time. In one place our author tells us :

"Sir Francis Bond Head immediately (i. e. on being apprised of the approach of the rebels) repaired to the City Hall, at the Market Square, where four thousand stand of arms and accoutrements were deposited. One of the first persons he met there was the Chief Justice Robinson, with a musket on his shoulder. He immediately ordered the arms to be unpacked and the alarm bell rung. Speedily he was joined by a whole host of gallant fellows, who were soon armed and provided with ammunition. They manned the windows of the City Hall and those of the houses opposite. Then the Lieutenant-Governor, having stationed one of his *aides-de-camp*, the Hon. Mr. Justice Jones, with a picquet of thirty men near the rebel post on Yonge Street, tranquilly waited for the morning."

We have no doubt the members of the bar eagerly followed the example so gallantly set by their judges. Lawyers, we make bold to say, are not excelled in loyalty by any class, and are never slow in the country's need to exchange their briefs for fire-arms. Every lawyer must recall with pride the gallantry displayed by our English forefathers when Buonaparte was threatening the shores of England. It was then the corps of volunteers, to which the epithet "Devil's Own" was first flatteringly applied, was formed in the Inns of Court, and it included in its ranks some of the most illustrious advocates that ever lived. It did not always follow that the finest legal talents were accompanied by equal military genius, for Mr. Law (Lord Ellenborough) was looked upon by drill-instructors as an incorrigible blockhead.

It would be unfair to omit the thrilling description which Plinius Secundus gives of the uprising of '37; though perhaps it was more appreciated by his contemporaries than it will be to-day.

"Anon MACKENZIE's maddening zeal,  
With fire, such as false patriots feel,  
Unsheathes the steel and gives the word  
To raise the fratricidal sword.  
Collegued with him stern PAPINEAU  
Contrives the simultaneous blow.  
They shrink not, till with flame unblest,  
Fiercely blaze out both east and west ;



## CURIÆ CANADENSES.

And fiery musquets' deafening roars  
Are heard throughout our hapless shores."

In this dreadful state of affairs, we can fancy that the peaceful pursuit of the law was considerably disturbed. The "fiery musquets' deafening roar" would have been as effectual to clear an office of students as a circus band is in these piping times of peace. Happily the lawyers were soon enabled to lay down their arms, and resume their less dangerous, if equally keen, contentions. With what feelings of satisfaction, the reward of duty manfully discharged, they must have exclaimed, "*Cedunt arma togæ*," when

"Peace restored and discord o'er,  
The volleying thunder ceased to roar,  
And Canada the near and far  
Emerg'd from the din of war."

In the year 1842, just before the union of the Canadas, the legislature was transferred to Kingston, and thither also went the newly-created Court of Chancery. Neither legislature nor court took kindly to that respectable city, and the migration of the court and its return to its present seat are thus chronicled by our author:

"From fair TORONTO's spire-clad plain  
The court vice-regal, and its train  
Of Lawyers, Benchers, Pleaders, all  
To KINGSTON drag their judgment hall.  
Yet here, the law perplexed, distressed  
And wandering, Justice knew no rest.

"Her practice cramped and out of place,  
Poor CHANCERY felt but ill at ease.  
Backward again the vagrant strays,  
The stony roads and wooden ways  
Of old TORONTO to regain—  
Ne'er may she quit that soil again!

"Dreary and sad was Frontenac!  
Thy Duke ne'er made a cleaner sack  
Than when the edict to be gone  
Issued from the vice-regal throne.  
*Exeunt omnes*, helter-skelter,  
To LITTLE YORK again for shelter:

"Little no longer, YORK the NEW,  
Of imports such can boast but few:  
A godly freight without all brag,  
When comes, 'mongst others, MASTER SPRAGGE

And skilful TURNER, versed in pleading,  
The Kingston exiles gently leading."

If we are not carried away by admiration of the poetical talent of Plinius Secundus, we can at least admire the enthusiasm with which he always speaks of the present centre of laws, learning and light in this Province, and echo the hope that nothing will prompt the Court of Chancery, or any other Court, to "quit this soil again." The author's grounds for his sanguine belief in a great future for Toronto are touched upon in a note, where he says:

"When Bouchette, the Surveyor-General, under the orders of Governor Simcoe, then residing at Niagara, surveyed, in 1793, York Harbour, the site of Toronto was a covey for wild fowl. Two Mississauga families were the only inhabitants, and when the Governor paid a visit in the following summer to determine on the future capital of Upper Canada, his residence was a canvas-covered dwelling. Now, in 1843, the population is estimated at 17,000; the census of 1841 was 14,249. You here behold a Governor's palace (!) supreme and other law courts, public offices, a college and university, banking and other companies, handsome streets lighted with gas, wharves, and a capacious harbour."

If Plinius Secundus yet lives and were suddenly set down amongst us to-day, we wonder if he would be able to find his way to Osgoode Hall.

We are reminded of some curious facts in the appendix to the poem. For instance, in the debate on the Chancery Bill, 3d of February 1837, in the House of Assembly, Mr. Gibson, apparently in a severely sarcastic mood, moved, seconded by Mr. McIntosh, that the solicitors and counsel in any cause in the said court should not be allowed *more than one-half of the property in dispute for the costs*. Lost! Yeas 11: nays 31. Mr. Prince, seconded by Mr. Gowan, moved the adoption of a schedule of fees in a suit for specific performance, to be used as a precedent, in which the total of costs reached the munificent sum of thirteen

## THE NEW DIGEST—CARELESS TEXT BOOKS.

pounds seventeen shillings and six pence. Carried. Yeas 27; nays 27. We read that a statute was passed in 1803 which recited that great inconvenience was felt "in several parts of this Province from the want of a sufficient number of persons duly authorized to practice the profession of the law," and empowered the Governor to admit *six* additional practitioners. Modern legislation has a different tendency, and it can hardly be said that now, as Plinius Secundus puts it with gentle irony, "Upper Canada enjoys an inadequate supply of lawyers." In 1823 the first Reporter to the Courts was appointed, whose duty it was to submit, on the first day of each term, a fair report of the decisions of the preceding term; which report, after due examination and correction by the whole Court, was to be signed by all the Judges in open court. The gentleman who held the office first was Thomas Taylor, Esq., who was followed by Mr. Draper and Mr. Sherwood, and in 1843 the Reporter was Mr. John Hillyard Cameron. A specimen of the reported cases is preserved, it being assumed perhaps that "*Curia Canadenses*" would outlive the original volumes, in which the unaccommodating Doe, greatest and most litigious of landowners, complains of the lawless intrusions of the irrepressible Roe. We have said enough to show that the little book before us is not without its value to Canadian lawyers.

We even wish our author had been more garrulously inclined. There were many notable incidents which he must have seen or heard described in his time, which a chronicler of legal events might well have woven into his narrative. For instance, the famous prosecution of Robert Randall at Niagara for perjury; the action against the editor of the *Colonial Advocate* for libel, when that indomitable Scotchman defended himself successfully, in a speech of four hours' duration; or, at

a later date, the trial of the adventurer Von Schultz and his associates, whose forlorn defence was undertaken by a fearless young advocate whose name, familiarly abbreviated into "John A.," has since become a household word. There are many events of this sort which, as yet, live only in the conversation of a few grey-headed men.

## THE NEW DIGEST.

We have received, as doubtless have most of our readers, the first part of the new Digest, by Mr. Christopher Robinson and Mr. F. J. Joseph. To say that it is most welcome, scarcely expresses the delight which the hard-worked members of the profession will feel at its appearance. It had come to this, that the English, Irish, and American Reports were practically more accessible than our own. Mr. Robinson and Mr. Joseph "have changed all that," (at least as far as the middle of the letter A.) Our crowded columns this month prevent our referring at any length to this new Digest, and at present we shall only request those gentlemen, to whom the long vacation must be as useless for recreative purposes it is to ourselves, to let us have the rest of the parts as fast as the printer can work them off.

## SELECTIONS.

## CARELESS TEXT BOOKS.

During the discussion in the Court of Queen's Bench, as to the power of the court to adjourn a criminal trial for the purpose of obtaining further evidence, one of the judges read the following passage from "*Archbold's Criminal Pleading*," (p. 145, 14th sect.) "*Adjournment of Trial*.—Where the witnesses for the prosecution have all been examined, the judge may order the court to be adjourned, and direct another trial to be proceeded with in order to give time for the production of a thing essential to the proof de-

## CORPORATIONS AND SUBPENA DUCES TECUM.

posited at a distance: *R. v. Wenborn*, 6 Jurist, 267. And on a trial for murder before Maule, J., at York, 1848, after the opening address of the counsel, it was discovered that in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury was locked up, a fresh jury was called into the box, and another case was proceeded with:” *R. v. Foster*, 3 C. & K., 201. Now, will it be believed that in neither of these cases was there any adjournment at all; but merely a temporary suspension of the trial for an hour or two; the prisoner being carefully kept in the dock in order to mark more clearly that there was no adjournment, but that the trial was still going on; all the judges being of opinion that there could be no adjournment for such purpose, and no adjournment having ever taken place in a criminal trial, except for necessary rest, and from actual physical necessity. In the one case the trial was suspended for an hour or two while a document, accidentally left behind in the assize town, was being fetched; and in the other case the same course was taken to allow time for the arrival of a witness accidentally delayed by the lateness of a railway train. In both cases there was a very “brief” suspension of the trial on account of an accident, and in no other case was there any at all. In a note to the report in the “Jurist” attention is called to this, and it is stated that the same course is frequently taken at the Old Bailey. So that even although there was no adjournment, the propriety of a suspension of a trial was doubted, and Mr. Justice Willes and Mr. Justice Wightman denied it. (*Re Tempest*, 1 Foster and Finlason; *Re Fitzgerald*, 3 Foster and Finlason); and it was even denied in civil cases, prior to the Common Law Procedure Act, 1854 (*vide* Finlason’s Common Law Procedure Acts). Yet we have it stated, in “Archibald’s Criminal Practice,” edited by Welsby, that it was settled law that a criminal trial might be adjourned in order to obtain evidence, whereas all the authorities clearly show that a trial could not be adjourned, and could only be suspended for a portion of a day, on account of accident, and that even this was always doubted. This is the way in which text books are edited, even those which bear

the names of eminent men. The truth is, however, that such men are often those who have no time to edit books, and have to leave the editing to pupils or young assistants. Thus it was with men like the late Mr. Welsby, whose practice was enormous, and could not afford time to edit books. The publishers got a great name, and that was enough to secure the book a good sale, but in truth the book was edited by some young man who did not know enough of law to know the distinction between a suspension of a trial and an adjournment, and so he abstracted the case according to his own erroneous ideas upon the subject. This is how an enormous quantity of loose or bad law gets into the minds of men, and when it is once in their minds it is difficult to get it out of them, and this bad law gets at last confirmed from the bench.—*The Law Magazine*.

## CORPORATIONS AND SUBPENA DUCES TECUM.

It is an old saying that a corporation has neither soul nor conscience, and now it appears to have other advantages besides these over private persons. Apparently it enjoys the privilege of defying even a *subpœna duces tecum*, one of the most formidable processes with which the law of England has armed the courts of law and equity. In the celebrated case of *Amey v. Long*, 9 East. 472, Lord Ellenborough, in delivering the unanimous judgment of the Court of Queen’s Bench, repudiated the argument advanced by Sir Vicary Gibbs and Garrow, that that which is commonly called a writ of *subpœna duces tecum* was not of compulsory obligation in the law. Lord Ellenborough then said:—“The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a Court of Common Law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining

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NORTH VICTORIA ELECTION PETITION.

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written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favour of those in whose custody the required instruments might happen to be, afforded." His Lordship then proceeded to say that a witness served with such a subpoena ought to attend with the documents, and the judge at Nisi Prius ought, upon the principles of reason and equity, to decide whether production should be required, and whether the party withholding it should be attached. Now, in *Crowther v. Appleby*, reported in the current number of our Reports (43 Law J. Rep. N. S. C. P. 7), the Court decided that it ought not to attach the secretary to a railway company, who attends in obedience to such a subpoena, but refuses to produce documents on the ground that the directors have ordered him as their servant not to do so. No doubt it is an absurd dilemma for a servant to be on the one hand sent to prison if he does not produce a document, and on the other to be turned out of his situation by his master if he does. But equally would it be unjust if a corporation could defeat a litigant by the simple device of withholding documents essential to the proof of a cause. A statute allowing service of such a subpoena on a company, in the same way as a writ of summons is now served, and visiting the company with fine for neglecting to send the documents by a proper agent, might be useful. Meanwhile the best device is to serve *subpoena duces tecum* on all the directors, and on all such officials as the manager and secretary, and leave it to them to satisfy the Court that they have prohibited each other all round from obeying the process.—*The Law Journal*.

An Injunction was granted in *Raggett v. Findlater*, L. R. 17 Eq. 29, to restrain the defendant from using upon their labels the words "nourishing stout," which had been used by the plaintiff on their labels as a trade-mark, refused, on the ground that "nourishing" was a mere English adjective denoting the quality of the stout.

## CANADA REPORTS.

## ONTARIO.

## ELECTION CASES.

[Before Hon. W. B. RICHARDS, Chief Justice of Ontario ; Hon. J. G. SPRAGGE, Chancellor ; and Hon. I. H. HAGARTY, Chief Justice of the Common Pleas,

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

## NORTH VICTORIA ELECTION PETITION.

HECTOR CAMERON, *Petitioner* ; v. JAMES MACLENNAN, *Respondent*.

*Dominion Elections Act, 1874, not retrospective—When candidate disqualified as a petitioner—Assessment roll—Qualification of voters—Preliminary objections to bribery, treating, undue influence and travelling expenses—Bribery—Mistakes in voters' lists, &c—Report of Judges, to Speaker.*

- Held.* 1. That by the Dominion Election Act of 1873, the qualification of voters to the House of Commons was regulated by the Ontario Act.
2. That the Dominion Election Act of 1874 does not affect the rights of parties in pending proceedings, which must be decided according to the law as it existed before the passing of that Act ; sec. 20 of that Act referring to candidates at some future election.
3. That a candidate may be a petitioner, although his property qualification be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated, but he may still show that the respondent was not duly elected, if he so charge in his petition.
4. The assessment roll is conclusive as to the amount of the assessment ; but the mere fact of the name of a person being on the roll is not conclusive as to his right to vote. The returning officer is bound to record the vote if the person take the oath, but that is not conclusive.
5. The effect of sec. 20 of Controv. Election Act of 1873, as to the report of Election Judges to the Speaker considered.
6. On a petitioner claiming the seat on a scrutiny, the

Elec. Court.]

NORTH VICTORIA ELECTION PETITION.

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Court declined on a preliminary objection to strike out a clause in the petition, which claimed that the votes of persons guilty of bribery, treating and undue influence should be struck off the poll. The giver of a bribe, as well as the receiver, may be indicted for bribery; but, *Quære* as to the effect on their votes respectively under the present state of the law.

7. A petitioner claiming the seat on a scrutiny may show, as to votes polled for his opponent: (1) That the voter was not 21 years of age, (2) That he was not a subject of Her Majesty by birth or naturalization. (3) That he was otherwise by law prevented from voting, and (4) That he was not actually and *bona fide* the owner, tenant, or occupant of the real property in respect of which he is assessed.
8. The Court declined, in the present state of the law, to exclude enquiry as to the payment of travelling expenses of persons going to and returning from the poll, inasmuch as the same might amount to bribery.
9. Mistakes in copying the voters' lists should not deprive a legally qualified voter of his vote, (though the returning officer might properly refuse to receive it,) any more than the name of an unqualified voter being on the list would give him a right to vote. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or were not properly certified, or the omitting to do some act as to which the statute is directory, is no ground for setting aside an election, unless some injury resulted from the omission.

[Election Court—June 26, July 16, 1874.]

The petition filed in this case was as follows:

"The petition of Hector Cameron, of the City of Toronto, &c.

1. Your petitioner is a person who was duly qualified to vote at the above election, and who claims to have had a right to be returned or elected at the above election, and who was a candidate thereat.

2. And your petitioner states that the election was holden on the 22nd day of January, A. D. 1874, when the nomination took place, and on the 29th day of January, A. D. 1874, when the poll was held, and when James Maclellan and your petitioner were candidates, and the returning officer returned the said James Maclellan as being duly elected.

3. And your petitioner says that the said James Maclellan was by himself and other persons on his behalf guilty of bribery, treating

and undue influence before, during and after the said election, whereby he was and is incapacitated from serving in Parliament for the said electoral district, and the said election and return of the said James Maclellan were and are wholly null and void.

4. And your petitioner further says that many persons voted at the said election, and were reckoned upon the poll for the said James Maclellan, who were guilty of bribery, treating or under influence, and who were bribed, treated or unduly influenced to vote thereat for the said James Maclellan, and that the votes of all such persons were null and void, and ought now to be struck off the poll.

5. And your petitioner further says that many persons were admitted to vote and did vote at the said election for the said James Maclellan, who were not entitled to vote thereat or to have their names retained or inserted on the voters' lists for the said electoral division, by reason of their not being qualified in respect of property, occupation or value, or whose qualification was for other causes insufficient, or who were respectively subject to legal incapacity or were prohibited by law from voting, or were not subjects of Her Majesty by birth or naturalization, and such votes ought now to be struck off the poll.

6. And your petitioner further says that certain persons whose names appear on the voters' lists voted twice at the said election in favor of the said James Maclellan, and that persons personated and voted as and for certain electors whose names appear on the voters' lists but who did not themselves vote, and certain other persons not named on the voters' lists were allowed to vote and did vote for the said James Maclellan; and that the votes so recorded ought now to be struck off the poll.

7. And your petitioner further says that the poll books at the said election were and are incorrectly made up and cast, and the votes recorded therein incorrectly entered according to the votes given to the poll clerks, and ought now to be revised and corrected.

8. And your petitioner further states that many persons who had hired their horses, sleighs and carriages to the said James Maclellan and to his agents for the purpose of carrying electors to and from the polling places at the said election, voted for the said James Maclellan at the said election, and were reckoned on the poll for him; and that the travelling and other expenses of many persons in going to and returning from the said election, and who

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NORTH VICTORIA ELECTION PETITION.

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voted for the said James Maclellan, were paid by the said James Maclellan or by his agents, and that the votes of all such persons were and are void, and should be struck off the said poll.

9. And your petitioner further says that many persons whose names appeared upon the voters' lists, but who were not possessed of such property qualification as would enable them to vote at the said election, and who were fraudulently and colorably assessed upon the assessment rolls of the several municipalities of the said electoral division, voted for the said James Maclellan, and that the votes of all such persons were and are void, and should be struck off the poll.

10. And your petitioner further states that the voters' lists used by the several deputy returning officers at the said election were not correct alphabetical lists of all persons entitled to vote at the said election, within the several municipalities, or sub-divisions, or wards thereof, together with the number of the lot, or part of a lot, or other description of the real property in respect of which each of them was so qualified; nor were such voters' lists duly certified according to the statute in that behalf, but the names of divers persons not properly entitled to vote at the said election, and who voted for the said James Maclellan, were improperly inserted in such voters' lists, and ought to be struck off the poll, and the names of divers persons who were properly entitled to vote thereat, and who tendered their votes for your petitioner, were omitted from the said voters' lists, and ought to be added to the poll.

11. And your petitioner further states that the several deputy returning officers improperly rejected and refused to receive the votes of divers persons who were entitled to vote at the said election, and who tendered their votes thereat for your petitioner, and that such votes ought to be added to the poll.

12. And your petitioner further states that the polling sub-divisions or wards in the said electoral district were not the same as those used at the last preceding election of members of the Legislative Assembly, and that the polling places for each of the sub-divisions, or wards, were not provided in the most central and convenient place for the electors of such sub-divisions, or wards, nor was public and sufficient notice given, by proclamation or otherwise, of the said polling sub-divisions, and of the places appointed for holding the said poll,

and that the polling sub-divisions at the said election were not established according to law.

13. And your petitioner further states that the said James Maclellan obtained an apparent and colorable majority over your petitioner, whereas, in truth and in fact, your petitioner had a majority of votes of the electors of said electoral district, who voted at the said election, and who were at the time thereof duly qualified by law to vote, and was duly elected as a member to serve in Parliament for the said electoral district.

Wherefore, your petitioner prays that it may be determined that the said James Maclellan was not duly elected or returned, and that his election and return were, and are, wholly null and void, and that your petitioner, the said Hector Cameron, was duly elected, and ought to have been returned."

The following were the preliminary objections presented by the respondent:

1. The respondent objects to the said petition on the ground that at the time of the said election the said Hector Cameron was not legally or equitably seized as of freehold for his own use and benefit of lands and tenements held in free and common socage, within that part of the Dominion of Canada formerly known as the Province of Canada, and now constituting the Province of Ontario and Quebec, of the value of five hundred pounds sterling money of Great Britain, over and above all rents, charges, mortgages and incumbrances, charged upon, due and payable out of or affecting the same, nor was he seized or possessed for his own use and benefit of lands and tenements held in fief, or in *roture*, within that part of the Dominion of Canada formerly known as the Province of Canada, and now constituting the Province of Ontario and Quebec, of the value of five hundred pounds sterling money of Great Britain, over and above all rents, charges, mortgages and incumbrances, charged upon, due and payable out of or affecting the same, by reason whereof the said Hector Cameron had and has no status to be elected or serve as a member of the House of Commons for the said electoral division, and that the said Hector Cameron was not duly qualified to vote at the said election.

2. The respondent objects to the third paragraph of the said petition, on the ground that even if the fact were that the respondent was by himself or other persons, on his behalf, guilty of treating and undue influence, as alleged, such

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NORTH VICTORIA ELECTION PETITION.

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acts would not incapacitate him from serving in Parliament for the said electoral district, nor render the said election and return of the respondent null and void.

3. The respondent objects to the fourth paragraph of the said petition, on the ground that even if the fact were as stated, such fact is not sufficient to render the said votes null and void, or to entitle the petitioner to have the same struck off the poll.

4. The respondent objects to the fifth paragraph of the said petition, on the ground that even if the facts were as stated, such facts are not sufficient to entitle the petitioner to have such votes struck off the poll, or in any event would not prevent such persons voting at the said election.

5. The respondent objects to the seventh paragraph of the said petition, on the ground that even if the fact were as stated, such facts are not sufficient to render the election or return of the respondent null and void, or to entitle the petitioner to be declared duly elected and returned. [This objection was abandoned].

6. The respondent objects to the latter part of the eighth paragraph of the said petition, on the ground that even if the facts were as stated, such facts are not sufficient to render the election or return of the respondent null and void, or to entitle the petitioner to have the said votes declared null and void.

7. The respondent objects to the tenth paragraph of the said petition, on the ground that even if the facts were as stated, such facts are not sufficient to render the election or return of the respondent null and void, or to entitle the petitioner to be declared duly elected and returned.

8. The respondent objects to the twelfth paragraph of the said petition, on the ground that even if the facts were as stated, such facts are not sufficient to render the election or return of the respondent null and void, or to entitle the petitioner to be declared duly elected and returned."

A summons being taken out to set aside the preliminary objections,

*The Attorney General*, (*Bethune* with him), for the respondent, supported them.

*Oslar*, for the petitioner, *contra*.

RICHARDS, C.J., delivered the judgment of the Court.

Section 41 of the British North America Act, 1867, enacts that, until the Parliament of Canada otherwise provides, all laws in force in the several Provinces of the Union, relative (amongst other matters) to the follow-

ing: The qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly, or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers and their duties, the proceedings at elections, etc., shall respectively apply to elections of members to serve in the House of Commons for the same several provinces. Then, by a proviso, special provision is made that in Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged 21 years or upwards, being a householder, shall have a vote.

Under Imperial Statutes 3 & 4 Vict., cap. 35, sec. 28, it was provided that "No person shall be capable of being elected a member of the Legislative Assembly of the Province of Canada who shall not be legally or equitably seized as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seized or possessed for his own use and benefit of lands or tenements held in fief or in *roture*, within the said Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, charges, mortgages, and incumbrances charged upon and due and payable out of or affecting the same; and every candidate, at such election, before he shall be capable of being elected, shall, if required by any other candidate, or by any elector, or by the returning officer, make the following declaration":

Sec. 36, Con. Stat. of Canada, cap. 6, recites that under the 28th section of the Union Act every candidate shall, if required, make the following declaration:

"I, A B, do declare and testify that I am duly seized at law or in equity as of freehold, for my own use and benefit, of lands or tenements held in free and common socage (or duly seized or possessed for my own use and benefit of lands or tenements held in *fief* or in *roture* as the case may be), in the Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, mortgages, charges and incumbrances charged upon or due and payable out of or affecting the same, and that I have not exclusively or colourably obtained a title to or become possessed of the said lands and tenements, or any part thereof, for the purpose of qualifying or enabling me to be returned a member of the Legislative Assembly of the Province of Canada."

The section then proceeds to enact that

[Elec. Court.]

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every such candidate, when *personally* required as aforesaid to make the declaration, shall, before he shall be elected, give and insert at the foot of the declaration required of him a correct description of the lands or tenements on which he claims to be qualified according to law to be elected, and their local situation, by adding immediately after the word "Canada," which is the last word in the said declaration, the words "And I further declare the lands or tenements aforesaid consist of," &c.

Under both the Union Act and the consolidated statute, wilfully false statements in relation to the qualification make the party guilty of a misdemeanor, and liable to the pains and punishment incurred by persons guilty of wilful and corrupt perjury.

Sec. 37 of Con. Stat. enables a candidate to make the declaration voluntarily before as well as after the date of the writ of election.

Sub-sec. 2. "No such declaration, when any candidate is required to make the same by any other candidate, or by any elector, or by the returning officer, above provided, need be so made by such candidate unless the same has been personally required of him on or before the day of nomination of candidates at such election, *and before a poll has been granted*, and unless he has not already made the same voluntarily, as he is hereinabove allowed to do, *and not in any other case*; and when any such declaration has been so required according to law, the candidate called upon to make the same may do so at any time during such election; provided it be made before the proclamation to be made by the returning officer at the close of the election of the person or persons elected at such election."

Sub-sec. 3, allows the declaration to be made before the returning officer, or a J. P., who shall attest the same by writing at the foot the words "taken and acknowledged before me," etc., or words to the like effect, and by dating and signing the attestation.

Sub-sec. 4. When a candidate delivers or causes to be delivered such declaration so made and attested to the returning officer at any time before the proclamation made by him at the close of the election, he shall be deemed to have complied with the law to all intents and purposes.

The intention of the Imperial Legislature seems to have been to make the same qualification as to property necessary to qualify a candidate for the House of Commons, here in Ontario (Upper Canada,) as was necessary to qualify him to be elected a member of the House

of Assembly of the then Province of Canada. Of course the latter part of the declaration, where it alleged that the qualification was not colorably obtained to qualify him to be returned a member of the "Legislative Assembly of the Province of Canada," could not apply in the same words; the intention being that he should declare that he had not obtained the qualification colorably to qualify him to be elected "a member of the House of Commons of the Dominion of Canada." The intention seems plain and undoubted. There is also another difficulty in literally complying with the terms of the Con. Stat. cap. 6, as to the declaration being delivered to the returning officer at any time *before the proclamation* made by him at the closing of the election, no such proclamation being required under the election law as it then stood. By 29 & 30 Vict. cap. 13, sec. 10, no day was to be fixed for the closing the election, nor any proclamation of the candidate elected. Nevertheless, if the candidate made the declaration and delivered it to the returning officer before the polling was closed, and probably before the returning officer had made his return to the Clerk of the Crown in Chancery, of the total number of votes taken for each candidate, it would have been in time. Though the terms of the Consolidated Act could not be literally complied with, it could in substance. We are not, therefore, prepared to say that by the alteration in the law referred to there has been such a change effected that no property qualification was required by a candidate to be elected for the House of Commons at the time the election was held.

If the candidate who now seeks the seat was not qualified under the statute to be elected, I take it for granted that the respondent will show that, under the 54th section of the Controverted Elections Act of 1873. It does not follow from this, however, that he may not be a good petitioner. Before the Grenville Act, 10 Geo. 3, cap. 16, there was a difficulty as to the person who could be a petitioner, and his qualification as an elector was often attacked, but that statute provided that any person claiming to vote, or who claimed to be returned, might present a petition complaining of an undue election, under the Imp. Statute, 31 & 32 Vict. cap. 125 (from which our Acts are copied). It is provided by sec. 5, that a petition complaining of an undue return, or undue election of a member to serve in Parliament, may be presented to the court by any one or more of the following persons:—

1. Some person who voted, or who had a right



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to vote at the election to which the petition relates, or

2. Some person claiming to have a right to be returned or elected at such election, or

3. Some person alleging himself to have been a candidate at such election.

Under the Dominion Act of 1873, cap. 28, sec. 10, a petition complaining of an undue return, or undue election of a member, or of no return, or a double return, may be presented to the election court

1. By some person who was *duly qualified* to vote at the election to which the petition relates, or

2 & 3. Are in the very words of the Imperial Act.

Now, here the petitioner was a candidate, and claims to have a right to be elected and returned at the said election.

We have been referred to the *Honiton Case*, 3 Lud. 163, 165, (1782,) where it was decided that M's. election, having been declared void, by a committee, on the ground of bribery, and he stood on the vacancy, and being unsuccessful, petitioned against the return of his opponent, it was objected that as he could not legally be a candidate, he could not petition. The committee resolved that the said M. was not eligible to fill the vacancy occasioned by the said resolution. He was, therefore, not permitted to proceed. It is not very clear if a new election was prayed for, or that the return of the sitting member might be declared void. There were electors who were petitioners, and their petition was tried as to the charges of bribery, which were decided in favor of the sitting member.

In the *Taunton Case*, Feb., 1831, (referred to in Wolferstan's Law of Elections, at p. 8, and Perry and Knapp's Election Cases, 169, note), the objection that petitioner could not proceed, because the sitting member was prepared to prove bribery against him, was over-ruled.

In the *Penryn Case*, P. & K., 169 n, the petitioner had refused to take the qualification oath, when called upon. The committee held that, not having complied with the necessary provisions to give him the character of a candidate, he had no title to petition: *Sandwich v Great Grimsby*, ib.; Roe on Elections 2 ed., 2 vol., 123; Rogers on Elections, 10 ed., 410.

But a person alleging himself to be a candidate is entitled *prima facie* to petition, unless his disqualification is obvious and incontestable: *Londonderry Case*, W. & B., 214, (1860.)

It is no objection to the petition of electors being proceeded with, that their candidate is

disqualified: *Colchester*, 3 Lud., 166, unless, *semble*, the petition *only* claims the seat for the candidate on the ground that he had the majority of legal votes.

In Wolferstan's book at p. 5, referring to the petitioner under the English Act, as to a person who voted, or had a right to vote at the election to which the petition relates, the author says, that this means those who rightfully voted, or whose qualification on the register, whether they voted or not, was unimpeachable at the time of the election: *Lisburn Case*, W. & Br., 222, decided under secs. 11 & 12 Vict., cap. 98. The words of 31, 32 Vict., cap. 125, are identical: *Chellenham Case*, W. & B., 63.

Under the statutes previous to 11 & 12 Vict. cap. 98, any one claiming in his petition to have had a right to vote at the election might petition. But under that state of the law committees allowed the sitting members to show that the petitioners had not the right they claimed: *North Cheshire Case*, 1 P. R. & D., 214; *Berwick Case*, 30th June, 1820; *Contra*, *Harwich Case* 1 P. R. & D., 73, and *Aylesbury Case*, *ibid*. 81.

In the second edition of the Law of Elections, by Leigh & LeMarchant, at p. 108, it is stated, "Although the words of the Act say one or more, it is prudent, provided the petition be presented by electors, to include some larger number as petitioners, in case an objection should be taken that though they had voted they had no right to vote at the election. Care should also be taken that all the petitioners should as far as possible be voters whose votes could not be impeached. If the petition is presented by a candidate, it means by any person elected to serve in Parliament at an election, or any person who has been nominated as, or declared himself a candidate at an election."

These proceedings on election petitions are not now considered as matters in which the parties to them are alone interested. To use the language of Bovill, C. J., in *Waygood v. James*, (*Taunton Case*) L. R. 4 C. P. 365: "The enquiry is one not as between party and party, but one affecting the rights of the electors, the persons who are or may be members or candidates, and the House of Commons itself." And in the *Brecon Case*, 2 O'M. & H. 34, Mr. Justice Byles said, "the petitioner being a trustee for the whole body of the voters for the borough, and for the public generally, cannot withdraw unless he complies with the provision of the statute." Under the statute, the proceedings are not simply served on the sitting

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members, but a copy of the petition is sent to the returning officer, and he is required to publish the same, so that when a petition is presented it is known who the petitioner is, and if he is a candidate that is known throughout the electoral district. If he represents himself as a voter duly qualified to vote at the said election, on looking at the rolls and voters' lists, it there appears, if he was duly qualified to vote as he claims. On turning to the statute, any person interested in the election sees it plainly stated that a candidate or voter, duly qualified to vote at the election, may petition. Under such circumstances, all persons interested in the matter would assume that the petition would go on. The special provisions in the Act to guard against a collusive withdrawal of the petition would all induce an interested elector to suppose when a petition was presented by a candidate, or a voter duly qualified to vote at the election, that nothing could be urged against the enquiry being proceeded with.

It is objected against the petition that the petitioner did not possess the necessary qualification to be a candidate. He was a candidate, in fact. His right to be such is only now questioned; and, unless there is some case (binding on us) which expressly holds that if the preliminary enquiry establishes the fact that the candidate was not qualified, therefore he has no *locus standi* to show that the sitting member is not duly elected, we think we ought not to stay the enquiry as to the respondent's right to hold the seat.

The decision of committees to which we have referred are not uniform, or we might be bound by them under section 83 of the Dominion Act. There has been no case cited on this point that has been decided since the new Act came in force in England, that holds that if the petitioner is disqualified as a candidate, that the enquiry cannot be pursued. In the last edition of Leigh & LeMarchant's Law of Elections, at page 76, referring to the practice, it is stated, "The general charges would usually be gone into first by the petitioner, and, at the close of his case, the respondent's counsel proceeds not only to answer the charges against the respondent, but to open counter charges against the petitioner, (that must be when he is a candidate). If the petitioner is disqualified, a scrutiny of votes may still take place for the purpose of showing that the respondent has not really a majority of legal votes, even though the respondent is declared not to have been guilty of corrupt practices; and the following lan-

guage of Baron Martin is quoted: The question in the scrutiny would be which of these gentlemen had the majority of legal votes, and assuming the petitioner to have been personally incapacitated, that would not have affected the votes of the persons who gave their votes for him, they being ignorant of it. They would be perfectly good votes, and the persons who were the supporters of the petitioner would have a right to have it determined whether or not the respondent was sent to Parliament by a legal majority." *York, West Riding, Southern Division*, 1 O'M. & H., 214

The language of Willes, J., as follows, is also cited, "Against any member, therefore, who is elected in the first instance, any one directly interested may petition. If the petitioner does not claim the seat, there is no recrimination allowed; but if the petitioner does claim it, the respondent is entitled to protect himself, and, before the scrutiny, prove a recriminatory case, and show that the election of the other candidate could not stand. It is true that even if he proves it *the petitioner may still go into the scrutiny to turn out the sitting member*." *Waygood v. James*, (*Taunton Case*), L. R. 4 C. P. 368.

In the *Norwich case*, as reported in 19 L. T. Rep. N. S. 620, it was urged that as the sitting member had been unseated for bribery by his agents, he had no further interest, and had no *locus standi*. Martin, B. said, "Is not the sitting member a respondent in respect of every matter that you charge in your petition and in respect of every claim you make in your petition, and has he not a right as *having been a candidate*, though he may be unable to protect his own seat, to show that you are not entitled to it?"

We think the weight of reason and authority is in favour of allowing a candidate to be a petitioner under the statute, though his property qualification may be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated; but he may still show that the respondent was not duly elected if he so charges in his petition.

By section 21 of the Dominion Act of the last session of Parliament, respecting the election of members of the House of Commons, it is provided that from and after the passing of this Act, no qualification in real estate shall be required of any candidate for a seat in the House of Commons of Canada, any statute or law to the contrary notwithstanding; but such

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candidate shall be either a natural born subject of the Queen, or a subject of the Queen, naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, New Brunswick, Manitoba, British Columbia, or Prince Edward Island, or of this Parliament.

By section 134, it is enacted that the Act passed by the Parliament of Canada in the 36th year of Her Majesty's reign, intituled, "*An Act to make temporary provision for the election of members to serve in the House of Commons*," is hereby repealed, except only as to elections held, rights acquired, or liabilities incurred before the coming into force of this Act; and no enactment or provision contained in any Act, of the Legislature of the late Province of Canada, or of any of the Provinces now composing the Dominion of Canada, respecting the election of members of the Elective House of the Legislature of any such Province shall apply to any election of a member or members of the House of Commons held *after the passing of this Act*, except only such enactments and provisions as may be in force in such Province at the time of such last mentioned election, relating to the qualification of electors and the formation of voters' lists, which will apply for like purposes to elections of members of the House of Commons as provided by this Act. By section 135, it is provided that this Act shall come into force on the first day of July next after the passing thereof.

Where proceedings have been taken before the passing of the Act referred to, to set aside the election of a member for want of the property qualification required by law at the time the election took place, can the 20th section of the Act above quoted be successfully invoked to aid the unqualified candidate, and destroy the rights of the petitioners?

If proceedings in the Election Court are to be analogous to suits in other Courts, then the rights of the parties ought to be decided according to the law as it stood before it was repealed. No doubt there may be cases where persons may be deprived of rights and remedies which they had when the actions were commenced, by the effect of some Act of Parliament. But then it ought to appear that such was the intention of the Legislature in passing the Act, or that such result was the natural and proper one to flow from the Act itself. The intention seems to be, by the 134th section,

that the Act in force at the time the elections took place should not be repealed as to elections held, rights acquired, or liabilities incurred before the coming into force of that Act. It also refers to certain enactments which should not apply to any election of a member of the House of Commons *held after the passing of the Act*. The obvious intention of the Legislature seems to have been that which would be considered reasonable, viz., that as to the elections held before the passage of the Act, the law then in force should prevail, whilst as to elections after the passing of the Act the new law should be acted on, and govern the rights of the parties.

Under the Dominion Stat., 31 Vict. cap. 1, the Interpretation Act, in relation to the construction of Acts of the Parliament of Canada, it is provided by sec. 7, sub-sec. 35, that "When any Act is repealed, wholly or in part, and other provisions substituted, all officers, persons, bodies politic or corporate acting under the old law shall continue to act as if appointed to act under the new law, until others are appointed in their stead; and all proceedings taken under the old law shall be taken up and continued under the new law, when not inconsistent therewith; and all penalties and forfeitures may be recovered, and *all proceedings had in relation to matters which have happened before the repeal, in the same manner as if the law were still in force*, pursuing the new provisions so far as they can be adapted to the old law."

Sub-sec. 36. "The repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued or established, or any proceedings commenced in a civil cause before the time when such repeal shall take effect, but the proceedings in such case shall be conformable, when necessary, to the repealing Act."

Sub-sec. 37. "No offence committed, and no penalty or forfeiture incurred, and no proceedings pending under any Act at any time repealed, shall be affected by the repeal, except that the proceedings shall be conformable, when necessary, to the repealing Act; and that when any penalty, forfeiture or punishment shall have been mitigated by any of the provisions of the repealing Act, such provisions shall be extended and applied to any judgment to be pronounced after such repeal."

The section as to the property qualification does not come into force by repeal of the Act of 1873, under which this election was held, but by its own affirmative power, declaring *that after the passing of the Act no qualification should*

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be required of a *candidate* for a seat in the House of Commons of Canada. The petitioner here became a candidate before the Act in question was passed, and the election which he is contesting was held, and the respondent was returned as a member, before the Act in question was introduced. The fair and reasonable interpretation of the meaning of the Legislature is, that the 20th section refers to candidates for a seat at some future election, not to candidates when the election had taken place, and when what is to be done in relation to them is to correct the errors and mistakes then made.

The proper view to take, we think, looking at the statute itself the Interpretation Act, and the general rules applicable to the construction of statutes, is that the Legislature did not intend to affect the rights of parties in pending proceedings, but that they should be decided as the law existed before the passage of the Act referred to.

We have already stated what we think the law was on the subject of the property qualification necessary to be possessed by candidates to qualify them to be elected, when the election in question took place.

As to the objection to the charge of treating and undue influence alleged in the third paragraph of the petition in connection with bribery, if the treating were to such an extent as to amount to bribery, and the undue influence was of a character to affect the whole election without referring to any statutory provisions, it would by the law of Parliament, I apprehend, influence the result.

The first principle of Parliamentary law, as applicable to elections, is that they must be *free*, and if treating and undue influence were carried to an extent to render the election *not free*, then the election would be void. The following observations apply generally to votes that may be influenced by treating, etc. A vote influenced by treating was bad before the statute, and is bad now. Under the statute it would seem necessary to show not only that the entertainment was corruptly received by the voter, but that it was corruptly given by the candidate; but as proof of the former would invalidate the vote at common law, it is unnecessary to add proof of the latter.

The 23d section of the Corrupt Practices Act of 1854, (Imp.) which declares the giving of entertainments to voters on the polling and nomination days to be illegal, says nothing as to the effect upon the votes given. For this, therefore, resort must be again had to the common law of Parliament; and the question will be as heretofore,

whether the vote was influenced by the result of the entertainment or not.

A vote unduly influenced, is, as will be seen, a bad vote by the Common Law of Parliament. Rogers on Elections, 10 Ed., p. 586.

It is very embarrassing to carry out the Dominion Controverted Election Act of 1873, owing to the fact that we have no Corrupt Practices Prevention Act applicable to Dominion elections, which contains all of the provisions of the Imperial Act of 17 & 18 Vict. cap. 102, and that the Dominion Act of 1873 omits the 43d and 44th sections, which are contained in the Parliamentary Elections Act of 1868, Imp. Stat. 31 & 32 Vict., cap. 125, from which the Dominion Act was undoubtedly framed. These sections, with some in the Corrupt Practices Act, have a very important bearing on the questions which may come before the election judges.

Under the 43d section, when it is found by the report of the Judge upon an election petition under the Act that bribery has been committed by, or with the knowledge and consent of, any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to, and of sitting in, the House of Commons during the seven years next after the date of his being found guilty, and he shall be further incapable, during the said seven years, of holding office, etc.

The 44th section makes his election void if he employs any person as his agent who has been found guilty of any corrupt practice, or reported guilty of any corrupt practice by a Committee of the House of Commons, or the report of a Judge on an election petition under the Act, or a report of Commissioners appointed under cap. 57, 15 & 16 Vict.

Under the 45th section, any person other than a candidate found guilty of bribery in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, during the next seven years after the time he has so been found guilty, be incapable of being elected or sitting in Parliament.

By the 36th section of the Corrupt Practices Prevention Act of 1854, Imperial Statute, it is enacted: If any candidate, at any election for any county, city or borough, shall be declared by any Election Committee, guilty, by himself or agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city or borough, during the Parliament then in existence.

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The law being in this state in England, the Parliamentary Elections Act, sec. 3, declares that corrupt practices shall mean bribery, *treating* and *undue influence*, or any of such offences as defined by Act of Parliament, or recognized by the Common Law of Parliament. By the same section of the Dominion Controverted Elections Act of 1873, it is declared that corrupt practices shall mean bribery and undue influence, treating, personation and other illegal and prohibited acts, in reference to elections, or any of such offences as defined by Act of the Parliament of Canada.

Under section 20 of the Dominion Act of 1873, cap. 28, when any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the Judge shall, in addition to the certificate (required by the 19th sec.), and at the same time report in writing to the Speaker as follows:

(a) Whether any corrupt practice has or has not been proved to have been committed by, or with the knowledge and consent of, any candidate at such elections, stating the name of such candidate and the nature of such corrupt practice.

(b) The names of any persons who have been proved at the trial to have been guilty of any corrupt practice.

(c) Whether corrupt practices have, or whether there is reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates.

These provisions are similar to those contained in the Imperial Act.

Taking the whole of that Act, it is very apparent that the report as to corrupt practices is consistent with it, and by it certain results are to follow the report. The want of these omitted clauses, and of the 36th section of the Corrupt Practices Act, renders it difficult to say how far the report, as to sections (b) and (c), required of the Judge, will be of use when returned to the House of Commons. The Legislature still requires the report to be made, and we do not see how we can strike out the clause of the petition complaining of the practices referred to.

The 18th section of Dominion Act, 36 Vict., cap. 27, forbids any candidate, directly or indirectly, to employ any means of corruption by giving any sum of money, office, place or employment, gratuity or reward, or any bond, bill or note, or conveyance of land, or any promise of the same, nor shall he, either by himself or his authorized agent for that purpose, threaten

any elector with losing any office, salary, income or advantage, with intent to corrupt or bribe any elector to vote for such candidate, or to keep back any elector from voting for any other candidate; nor shall he open and support, or cause to be opened and supported at his costs and charges, any house of public entertainment for the accommodation of the electors; and if any representative returned to the House of Commons is proved guilty, before the proper tribunal, of using any of the above means to procure his election, his election shall be thereby declared void, and he shall be incapable of being a candidate, or being elected or returned during that Parliament."

The Corrupt Practices Act of 1860, passed by the Province of Canada, defines bribery in the same way as the English Act of 1854, and in the same way declares the offence a misdemeanor, for which the parties may be punished, both the giver and receiver of the bribe. Under the 6th section of the English Act, it is provided that if a person wishes to be placed on the list of voters who has been convicted of bribery or undue influence at an election, or a judgment recovered against him for any penal sum recoverable in respect of any of the offences of bribery, treating or undue influence, then the Revising Barrister shall erase the name of such person from the list of voters; or if he claims to have his name inserted on the list, he shall disallow such claim; and the names of such persons so expunged from the list of voters, or refused to be placed thereon, shall be inserted in a list of persons disqualified for bribery, treating or undue influence, which shall be appended to and published with the list of voters.

The 36th section, already referred to, applies to the candidate, and declares him incapable of being elected or sitting in Parliament, when he shall be declared guilty by an Election Committee.

The 3rd section of the Provincial Statute of 1860 makes the hiring of vehicles to convey electors to the polls, or paying the expenses of electors in coming to the polls, illegal acts, and makes the person offending liable to a penalty of \$30 for each offence, and costs of suit; and any elector who shall hire his horse to any candidate, or the agent of such candidate, for the purpose of conveying electors to or from the polls, shall, *ipso facto*, be disqualified from voting at such election, and shall also forfeit \$30 to any person who shall sue for the same.

This section, and the 17th section of the Dominion Act, cap. 277, of 1873, seem to be the only ones which declare the effect on the voter

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and the candidate of the illegal and prohibited acts.

In the Act of 1860, the bribery is declared to be a misdemeanor, and the mode of recovering the penalty pointed out, but its effect on the status of the member and the voter is not declared.

Whilst the Controverted Election Act of 1873 defines what corrupt practices shall mean, and makes it necessary for the Judge, under certain circumstances, to report whether such practices have been proved to have been committed, and by whom committed, yet the statute does not declare the effect of such report. We are then left in these unprovided cases to the common law of Parliament.

The bribing of an elector was always punishable at common law, independent of the statute: Rogers on Elections, 10 Ed. 306, and Lord Mansfield's opinion expressed in *Rez v. Pitt*, 3 Burr. 1338.

In *Rez v. Vaughan*, 4 Burr. 500, Lord Mansfield said, "Wherever it is a crime to take it is a crime to give; they are reciprocal. And in many cases, especially in bribery at elections to Parliament, the attempt is a crime; it is complete on his side who offers it."

It therefore appears to be a crime in the giver as well as the receiver of the bribe, and both may be indicted.

In Bushby's Election Law, 4 Ed. 111, it is stated: "Now one consequence in Parliament of common law bribery, when committed by a duly qualified and successful candidate at an election, was to enable the House, and it exclusively, to annul his return, and that though only a single bribe was proved. All the votes so procured were void, and even after deducting them had he still a majority in his favor, the result was the same. See May's Parl. Prac. 7 Ed. 56."

This was intended not so much as a penalty, as to secure to constituents a free and incorrupt choice, seeing that a single purchased vote, brought home to the candidate, might well throw doubt on his whole majority.

It is said an elector who has administered is not disqualified at common law from voting afterwards at that or any other election: Bushby 114, and cases there cited.

The unauthorized bribes of third persons, who are not agents of the candidate, do not affect his return, though given in his interest, unless the majority depends on votes so obtained, or unless such bribes occasion general corruption: Bushby, 121.

It seems a strange state of the law that the person who bribes may be indicted for a crime and punished in that way, yet his vote may stand good, whilst the person bribed loses his vote and the candidate may lose his seat. It may be that this will be the result, because of the omissions in our statute law; but when the evidence in such a case is brought before me, and I am compelled to decide, I would give the question more consideration than I have been able as yet to bestow on it, before holding that the vote of the person giving the bribe would be held good.

In being called on as we now are, without any evidence before us, to decide certain questions which may affect the qualification of voters or the standing of candidates, and which in truth can only apply to a limited number of cases, (the law, both in the Dominion and the Province of Ontario, differing now from the statute under which we are acting), the language of Willes, J., in *Stevens v. Tillet*, L. R. 6 C. P. 166, seems to me peculiarly applicable. He says: "The order in this case to strike out the clauses in the petition which were objected to must therefore be sustained, if it be sustained, upon showing that leaving those clauses in the petition could not have any effectual end in the disposal of the prayer thereof, whatever might be the character of the evidence which was produced before the Judge at the trial. The true question, as it appears to me, upon this occasion, is whether in any reasonably conceivable state of the evidence a case might be made out, upon the trial of this petition before the Judge in the regular and ordinary way, which would make it the duty of the Judge to grant the prayer of the petition."

We do not feel warranted, in this stage of the proceedings, in striking out that portion of the fourth paragraph of the petition which relates to the votes of persons who were guilty of bribery, treating or undue influence.

Under the Dominion stat., 36 Vict., cap. 27, sec. 2, the laws in force in the several Provinces of Canada, Nova Scotia, and New Brunswick, on 1st July, 1867, relative to the qualifications &c. of members, the voters at elections of such members, the oaths to be taken by voters \* \* \* and generally the proceedings at and incident to such elections, shall, as provided by the British North America Act of 1867, continue to apply respectively to elections of members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, subject to exceptions and provisions thereafter made.

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By sec. 4, subject to the provisions thereafter made, the qualification of voters at elections in the Province of Ontario, for members of the House of Commons *shall be that established by the laws in force in that Province on 23rd January, 1869, as the qualification of voters at elections of members of the Legislative Assembly*; and the voters' lists to be used at the election of members of the House of Commons shall be the same as if such elections were of members of the Legislative Assembly, on the basis of the qualification aforesaid; and the polling subdivisions or wards shall be the same as if such elections were for members of the Legislative Assembly; and the returning officer shall provide a polling-place for each sub-division or ward in the most central or convenient place for such elections.

By sec. 5, the oath or affirmation to be required of voters in the said Province shall be that prescribed by the 54th section of cap. 6 of the Consolidated Statutes of Canada, and no other, except in Algoma and Muskoka, as there after provided.

Under sec. 41 of the British North America Act, all laws in force in the several Provinces at the time of the Union relative to the voters at elections of members of the Legislative Assembly, the oaths to be taken by voters, the proceedings at elections, &c., respectively, apply to elections of members to serve in the House of Commons. The qualification of voters in Ontario referred to by section 4, above cited, is regulated by Provincial statute, 32 Vict., cap. 21. By sec. 5, of that Act, the following persons, and no other persons, being of the full age of twenty-one years, and subjects of Her Majesty by birth or naturalization, and not being disqualified under the preceding sections (2, 3, 4,) or otherwise by law prevented from voting, if duly registered or entered on the last revised and certified list of voters according to the provisions of that Act, shall be entitled to vote at the elections of members to serve in the Legislative Assembly, viz:—

(1.) Every male person *being actually and bona fide the owner*, tenant, or occupant of real property of the value hereinafter next mentioned, and being entered on the then last revised assessment roll for any city, town, village or township, as the owner, tenant or occupant of such real property of the actual value in cities of \$400, in towns of \$300, in incorporated villages of \$200, and in townships of \$200, shall be entitled to vote at elections of members of the Legislative Assembly.

As to the fifth paragraph, we think the petitioner may show:—

1. That the voter was not twenty-one years of age.
2. That he was not a subject of Her Majesty by birth or naturalization.
3. That he was otherwise by law prevented from voting.
4. That he was not actually and *bona fide* the owner, tenant or occupant of the real property in respect of which he is assessed.

We think the roll conclusive as to the amount of the assessment. The fact that the name of a person is on the assessment roll or list of voters is not conclusive as to his right to vote. If his name is on the list and he takes the oath required by the statute, the returning officer may be bound to record his vote, but that does not seem conclusive under the words of the Ontario Act. It is not being registered that gives the qualification; but though he has the qualification in other respects he cannot vote unless his name is entered on the proper list. At one time, in England, though the name was on the register and the returning officer was bound to admit the vote, yet it might be attacked on a scrutiny, and even now for some causes may still be attacked.

Under the view we take of the qualification being regulated by the Ontario Act, we do not think we can properly pass over or disallow the part of the 5th paragraph of the petition objected to.

The objection to the 7th paragraph of the petition is, I think, abandoned. If not, I see no objection to the paragraph standing as it is.

Then, as to the objection to the latter part of the 8th paragraph, paying the travelling expenses of persons coming and returning from the election. By the Corrupt Practices Act of Canada of 1860, sec. 3, paying the expenses of voters is an illegal act, and any elector who shall hire his horse to any candidate or agent for the purpose of conveying electors to and from the polling places, shall be disqualified from voting at such election. Section 71 of the Ontario Act, 32 Vict., cap. 21, is similar in effect, and a penalty of \$100 is imposed, but the latter part provides that any elector who shall hire a horse, &c., for any candidate or for any agent of any candidate for the purpose of conveying any electors to and from the polling place, shall be disqualified from voting at such election, and under a penalty of \$100. *Cooper v. Slade*, 5 H. L. 772, seems to be to the effect that merely paying the expenses of an elector, as

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the law stood in England, was not a violation of the statute, but promising to pay might be held to be bribery. In the present state of the law we do not think we can properly exclude inquiring into these matters.

As to the objection to the 10th paragraph. If the names of persons, whose votes would not be legal in the view already expressed in the objection to the 5th paragraph of the petition, were inserted on the lists handed to the deputy returning officer, their votes for respondent would be bad, though the names were on the lists handed to the deputy returning officer, for the reasons already given. And if persons who were in other respects properly entitled to vote, and whose names were on the last revised and certified list of voters according to the provision of the statute, tendered their votes for petitioner, it may be contended with great force that they are entitled to have their votes now recorded for the petitioner. The mistake in copying their names on the list for the particular subdivision or ward should not deprive a legally qualified voter of his vote, though it might justify the deputy returning officer in refusing to receive it. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or their not being duly certified according to the statute, would be no ground for setting aside the election, unless some injury resulted from the omission, as if some electors were deprived of their votes, or the result of the election in some way was influenced by the mistake.

As to the 12th paragraph, the observation just made will apply to it. These objections to what may really be considered as omitting the doing of matters as to which the statute is considered as directory, have never been held of sufficient importance to avoid an election, unless it can be shown that some injustice has been done by the omission—that voters who were entitled to vote have been deprived of their rights, and that if what the statute required had really been done a different result would have followed. In the absence of this being shown, these objections would not have any weight; and this paragraph was given up on the argument.

The result is that all the paragraphs in the petition stand except the 12th: that all the preliminary objections are over-ruled except the 1st and the 8th, and if it is shown at the trial that the petitioner had not the necessary property qualification, he cannot be seated, but he may still show that respondent was not duly elected.

SPRAGGE, O.—I have entertained some doubt whether the voters' lists under the Provincial statute, 32 Vict., cap. 21, are not conclusive, so far as the property qualification of voters is concerned, though I confess I feel the force of the reasoning by which an opposite conclusion is arrived at. Section 5 of the Act defines the property qualification entitling a person to vote. Then follow other sections, making provision for the registration of voters and the making out by municipal officers of lists of persons entitled to vote. Then follows sec. 10, as follows:—"No person shall be admitted to vote unless his name appears on the last list of voters made, certified, and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election; and no question of qualification shall be raised at any such election, except to ascertain whether the party tendering his vote is the same party intended to be designated in the alphabetical list as aforesaid." Sec. 41 provides for an oath being administered to a voter by the deputy returning officer. This oath is in proof (*inter alia*) of property qualification in the real estate in respect of which the voter's name appears on the voters' list; also as to his being a British subject; as to his being of age; that he has not voted before at the election, and has not received or been promised anything to induce him to vote.

An oath being required as to the property qualification of the voter, is raising a question of qualification other than the question of identity, so that even at the election itself the voters' list is not conclusive as to the right of a person whose name is upon it, to vote: and if not conclusive there, it is, *a fortiori*, that it would not be conclusive upon a scrutiny upon the trial of an election petition.

Upon sec. 10 alone I should have felt some doubt, for the defining of the qualification in sec. 5 was necessary to the registration of voters, and preparing the lists for election; and the provision in sec. 5 might well be introduced in the Act for that purpose only; but sec. 41 and the voters' oath show that the voters' lists were not intended to be conclusive. The voter is required to swear that at the final revision and correction of the assessment roll he was actually, truly, and in good faith possessed, to his own use and benefit as owner or tenant, of the real estate in respect of which his name is on the voters' list; and I agree in thinking that the fact whether he was so possessed is a fact necessarily open to question upon a scrutiny.

HAGARTY, C.J., C.P., concurred.



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CARDWELL ELECTION PETITION.

[Elec. Court.]

## CARDWELL ELECTION PETITION.

HEWITT ET AL., *Petitioners*, v. HON. J. H. CAMERON, *Respondent*.

*Property qualification of Candidate—Declaration of qualification—Non-compliance with demand for.*

*Held*, (1). As in the *North Victoria Case*, that the Dominion Election Act of 1874 not being retrospective, the question of property qualification of candidates, at elections for members of the House of Commons, held before the passing of the Dominion Election Act of last session, can still be raised in pending cases.

2. That it is not necessary for an elector, demanding the property qualification of a candidate, to tender the necessary declaration for the candidate to make. The intention of the statutes being that the candidate must himself prepare the declaration.
3. That if the property qualification of a candidate be properly demanded at the right time, the demand must be complied with; and it is not sufficient after the return of a candidate is contested, for him to show that, at the time of his election or return, he was duly qualified.

[Election Court—June 26, July 16, 1874.]

The petition, in this case, stated :

3. That at the time of the said election, the said the Hon. John Hillyard Cameron was not legally or equitably seized as of freehold, for his own use and benefit, of lands and tenements held in free and common socage, within that part of the Dominion of Canada formerly known as the Province of Canada, and now constituting the provinces of Ontario and Quebec, of the value of £500 sterling money of Great Britain, over and above all rents, charges, mortgages, and incumbrances charged upon, due and payable out of, or affecting the same, nor was he seized or possessed for his own use and benefit of lands and tenements held in fief or in *roture*, within that part of the Dominion of Canada formerly known as the Province of Canada, and now constituting the Provinces of Ontario and Quebec, of the value of £500 sterling money of Great Britain, over and above all rents, charges, mortgages and incumbrances charged upon, due and payable out of, or affecting the same; by reason whereof the said the Honourable John Hillyard Cameron was incapable of being elected or returned as a member of the House of Commons for the said electoral division, and his election and return were and are void.

4. And your petitioners further say that at the nomination held on the said twenty-second of January, in the said electoral division, and before a poll was granted at the said election, it was personally demanded of the said the Hon.

John Hillyard Cameron by an elector entitled to vote at the said election, to wit, Robert Clarkson, of the township of Albion, in the said electoral division, farmer, that he, the said Hon. John Hillyard Cameron, should make, in the manner and to the effect mentioned in and required by the 38th section of the statutes of the Imperial Parliament of Great Britain and Ireland, passed in the third and fourth years of the reign of Her Majesty, Queen Victoria, chaptered 35, entitled "An act to reunite the Provinces of Upper and Lower Canada, and for the government of Canada," and by the 36th section of chapter 6, of the Consolidated Statutes of Canada, a declaration of his qualification to be a member of the House of Commons, as required by the said statutes; but the said the Hon. John Hillyard Cameron did not then, nor did he up to the time of the making of the return aforesaid, by the returning officer, make the said declaration, nor did he at any time deliver the same to the said returning officer, by reason whereof the election of the said the Hon. John Hillyard Cameron, and his return, were and are void.

5. Wherefore your petitioners pray that it may be determined that the said the Hon. John Hillyard Cameron was not duly elected or returned, and that the said election was void.

The respondent presented the following preliminary objections to the petition :

1. That the said petition was not filed nor any application made to the Election Court, or any judge thereof, to postpone the service thereof, until more than five days had elapsed after the recognizance had been entered into and security given by the petitioners for the payment of all costs, charges and expenses in the matter of the said petition.

2. That the statement in the third clause of the petition of the want of property qualification by the said respondent, at the time of the said election, is insufficient, and that he is not, and was not required by any law or statute to have such a property qualification as is stated in the said third clause, at the time of the said election, and that the said petition is insufficient in that respect, and there is no ground therein to avoid the election of the said respondent.

3. That the statement in the said fourth clause of the said petition is insufficient, and there is no ground therein to avoid the election of the said respondent, for the following reasons: that it is not stated therein that he had not already voluntarily made the declaration required by the said statutes in the 4th clause mentioned,

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before any demand made upon him by the said elector in the said clause mentioned; that he is not required by any law or statute to make any declaration of qualification to be a member of the House of Commons, as stated in the said 4th clause of the said petition; that it is not stated in the said 4th clause that any declaration was tendered or offered to him to make, by the said elector, at the time he made such demand, or at any other time; that there is no time required by law within which such declaration, if demanded, shall be made, and that it is sufficient if, when the return of a member to the House of Commons is contested for want of a declaration being made by him of his property qualification, he can show that he had the property qualification required by law at the time of the election, or of his return as a member of the House of Commons.

Application being made to strike out the preliminary objections,

*J. H. Cameron, Q.C.*, the respondent in question, showed cause. Property qualification is now abolished. There is a distinction in the Acts between qualification and property qualification, and the Confederation Act as to qualification does not refer to property qualification. The Confederation Act is silent as to the "declaration by the candidate." The Acts of 1871, 1872, and 1873 are likewise silent. The petition states that the respondent was not seized of lands *and* tenements; it should have followed the statute and said lands *or* tenements. See *Smith's Real and Personal Property*. *Burton's Real Property*, shows that tenements may be different from land, and that a qualification of £500 in incorporeal tenements would be sufficient. It is not necessary a candidate should be seized of property.

*Bethune, contra*, for the petitioner. The objection to the use of the word "and" for "or" should not be regarded. The statute contemplated a property qualification at the time of the election. The new enactment did not affect that, and could not have been intended to do so.

*RICHARDS, C. J.*, delivered the judgment of the Court.

In disposing of the matters brought before us in relation to the *North Victoria Case*, we expressed our opinion that the question of want of property qualification in a candidate at the elections for members of the House of Commons held before the passing of the Act of the last session of the Dominion Parliament, can still be raised in pending cases, and therefore

the question of the property qualification of the respondent is now a matter which is to be decided under the petition.

As to the objection taken that the petitioners allege that the respondent was not seized of lands *and* tenements instead of lands *or* tenements, we do not think the respondent was in any way misled or prejudiced thereby, and in this respect the third clause of the petition may be amended, if the petitioners or their counsel wish it, though it hardly seems necessary.

Then as to the objection to the fourth paragraph of the petition, that it is not stated that any declaration was tendered to the respondent by the elector to make at the time he made the demand, or at any other time. The statute does not seem to require any tender of a declaration. What it says is, that before he shall be capable of being elected, the candidate shall, if required, make the declaration; and the Consolidated Statutes of Canada, cap. 6, sec. 36, enacts that such candidate, when personally required to make the said declaration, shall give and insert at the foot of the declaration required of him a correct description of the lands or tenements on which he claims to be qualified according to law to be elected, by adding after the word Canada; "And I further declare that the lands or tenements aforesaid consist of" &c. This latter part of the declaration must undoubtedly be in writing, and must in the very nature of things be prepared by the candidate himself.

The fact that the declaration may be in the alternative, that he holds lands *or* tenements held in free and common soccage, or lands or tenements held in fief or in *roture*, *as the case may be*, shows that the candidate must make his own declaration. It cannot be tendered to him filled up in the proper form to be made, unless the party knows *how* the qualification he claims to possess is held, whether in free and common soccage or in fief or in *roture*.

Taking the enactments together, the reasonable view is that the candidate must prepare his own declaration; it cannot, with any certainty of its being correctly done, be tendered to and demanded from him.

We think we have substantially disposed of the other substantial objection to this fourth paragraph in the *North Victoria Case*.

We are of opinion that the preliminary objections in this case must be over-ruled, and that the petitioners may proceed to prove the allegations in their petition if they can do so.

Elec. Court.]

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## NORTH SIMCOE ELECTION PETITION.

HEZEKIAH EDWARDS, *Petitioner*, v. HERMAN H. COOK, *Respondent*.

*Whether petitioner disqualified by bribery, &c.—When disqualification arises.—Champertry.*

A duly qualified voter is not debarred from being a petitioner on the ground that he has been guilty of bribery, treating or undue influence, during the election.

Disqualifications from such acts on the part of a voter or candidate arise after he has been found guilty, and there is no relation back.

It is not a champertous transaction that an association of persons with whom the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition.

[Election Court—June 26, July 16, 1874.]

The petition in this case stated,

2. That the election was holden on January 22, A.D. 1874, and continued until January 29, when Herman Henry Cook and Dalton McCarthy were candidates, and said Cook was returned as duly elected.

3. That the said Cook, by himself and his agents, was guilty of corrupt practices within the meaning of the term "Corrupt Practices" in the Controv. Elections Act, 1873, during the election.

4. That the said Cook did by himself and his agents at the said election, both directly and indirectly, employ means of corruption by giving or promising sums of money, offices, places, employment, gratuities, rewards, bonds, bills or notes, and conveyances of land to various electors entitled to vote at the said election with intent to corrupt or bribe such electors to vote for the said Cook.

5. That the said Cook did by himself and his agents at the said election, both directly and indirectly, employ means of corruption by giving or promising sums of money, offices, places, employment, gratuity, reward, bonds, bills or notes, and conveyances of land to various electors entitled to vote at the said election, with intent to corrupt or bribe said electors to keep back from voting for the said McCarthy.

6. That the said Cook did by himself and his authorized agents for that purpose, threaten divers electors entitled to vote at the said election with losing offices, salary, income, and other advantages with intent to corrupt or bribe such electors to vote for the said Cook.

7. That the said Cook did by himself and his

authorized agents for that purpose, threaten divers electors entitled to vote at the said election with losing office, salary, income, and other advantages, with intent to corrupt or bribe such electors to keep back from voting for the said McCarthy.

8. That the said Cook, at the said election, opened and supported, and caused to be opened and supported at his costs and charges, various houses of public entertainment in the said electoral division of the North Riding of the County of Simcoe, for the accommodation of the electors entitled to vote at the said election.

9. That the said Cook and his agents were guilty of corrupt practices at the said election by hiring teams, carriages, and other vehicles and means of conveyance from said electors, and paying, or promising payment for the same, with the view of inducing said electors to vote for the said Cook.

10. That the said Cook and his agents were guilty of corrupt practices at the said election by hiring teams, carriages, and other vehicles and means of conveyance from the said electors, and paying, or promising payment for the same, with the view of keeping back such electors from voting for the said McCarthy.

11. That the said Cook and his agents were guilty of corrupt practices at the said election, by treating the said electors thereat in order to induce them to vote for him, the said Cook.

12. That the said Cook and his agents were guilty of corrupt practices at the said election by treating the said electors in order to keep them back from voting thereat for the said McCarthy.

Wherefore, your petitioner prays that it may be determined that the said Cook was not duly elected or returned, and that the election was void.

The respondent filed preliminary objections, submitting:

1. That the petition should not be further proceeded with, on the ground that the petitioner was not duly qualified to vote at the said election, whereby he was incapable of being a petitioner.

2. That the petition should not be further proceeded with, on the ground that the petitioner was not actually and *bona fide* the owner, tenant or occupant of the real property of the value of \$400, in respect of which his name was entered on the list of voters used at the said election, and was not legally entered on the last revised assessment roll, upon which the said voters' lists was founded

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as such owner, tenant or occupant, because, as the fact was, one Faraghar was assessed in respect of the said real property as tenant, and one Arnall as owner of the same, at the value of \$200, which was the full value thereof, and the said Faraghar, at the time of the making of the said assessment, was in actual possession of the said property as such tenant, and no appeal was had against the said assessment of the said Faraghar, and after the delivery of the assessment roll to the clerk of the municipality by the assessor, the said Faraghar ceased to be, and the petitioner became, tenant of the said property at a monthly rent of five dollars and fifty cents, and thereupon the said petitioner appeared before the Court of Revision for the said municipality, and fraudulently procured the name of the said Faraghar to be erased from the said roll and the name of the petitioner to be substituted therefor, and fraudulently procured the value of the said property to be inserted in the said roll at \$600, in order to give the petitioner an apparent qualification to vote, and no notice of the said application of the petitioner was given either to the said Arnall or Faraghar, or any other person, or by public notice of any kind, but the said Court of Revision, well knowing the object of the said petitioner in procuring the said alterations in the roll to be made, and fraudulently intending to carry out the said object, made the said alterations, without which the petitioner would not have been entitled to vote; and the respondent submits that by reason of the matters aforesaid the said alterations were and are void, and the said Court of Revision had no jurisdiction, under the circumstances aforesaid, to make the said alterations, and the petitioner was not entitled to vote at the said election, and was therefore incapable of being a petitioner.

3. That the petition should not be further proceeded with, on the ground that the petitioner was before, during, and after the said election, guilty of bribery, treating and undue influence, whereby his status as a voter and a petitioner was annihilated.

4. That the petition should not be further proceeded with, on the ground that before the filing of the petition a champertous bargain was made between the petitioner and certain other persons known as the Liberal-Conservative Association, whereby it was agreed that the costs of the said petition should be paid by the persons known as the Liberal-Conservative Association aforesaid, and whereby the name of the petitioner should be used.

5. That the petition should not be further proceeded with, on the ground that the petition was not signed by the petitioner *bona fide* with intent on the part of the petitioner to prosecute it, but that his name was being used *mala fide* by other persons, who were the real petitioners.

A summons having been obtained to strike out the preliminary objections,

*McCarthy*, Q.C., for the petitioner, moved the same absolute, whereupon the Court called upon

*Bethune* in support of the preliminary objection. The petitioner was not a good petitioner, because the Court of Revision fraudulently inserted his name on the assessment roll, in order to give him an apparent qualification to vote. This was done without notice to any person affected by it, and therefore the Court had no jurisdiction to insert his name; *Regina v. Court of Revision of Cornwall*, 25 U. C. Q. B. 286. The petitioner was guilty of bribery, and therefore cannot vote; and if so, cannot petition. *Roe on Elections* states that an elector who was on the list, but disqualified, could not petition. Here it is charged that the voter was guilty of bribery before and at the time of the election, by reason thereof he is not qualified to vote. The words of the Act are that the petition must be signed by a person duly qualified to vote. Here he was not duly qualified to vote. The petition was signed by the petitioner at the instance of the Conservative Association, who agreed to pay the expenses of it. This is champerty: *Wallis v. Duke of Portland*, 3 Ves. 494. Champerty and maintenance is still a good defense to an action at law: *Carr et al. v. Tannahill et al.* 30 U. C. Q. B. 217. The same reason applies to petitions. This proceeding resembles a suit by a shareholder on behalf of himself and all other shareholders. If so, they must sue by some person who is not disqualified: *In re National Ec. Association* 4 De G. F. & J., 78.

*McCarthy*, Q. C., in reply. Admitting that, technically, the Court of Revision were wrong in putting petitioner's name on the assessment roll, nevertheless, as it appeared from the statement in the preliminary objection that the petitioner would have been entitled to have his name on the roll, the jurisdiction of the Court of Revision had been properly invoked for the amount for which it was inserted, and as the levy for the year was based on the roll as altered (however irregularly), and no

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complaint had been made, the petitioner's name would not even now be struck off on a scrutiny, and therefore he was a good petitioner.

As to the allegation of bribery by the petitioner, as a ground of objection to his status, that is not a valid objection. The Dominion Controverted Elections Act 1873 only allows recriminatory charges to be made against a candidate who petitions, or when the seat is claimed for him. The section referred to by Mr. Bethune (Con. Stat. Can., cap. 6, sec. 84) only disqualifies a voter who *has been* bribed, not one who has bribed another.

As to the fourth objection, it is not maintenance to agree to the prosecution of a suit in which they have a common interest: *Topham v. Duke of Portland*, 32 L. J. Chy. 906; and this point was expressly decided in *Lyme-Regis Case*, 1 P. R. & D. 25, and by the Chancellor in *Re North York* (not reported) where an application was made by a petitioner to have his name struck out of the petition on the ground that his signature was obtained by misrepresentation.

RICHARDS, C. J., delivered the judgment of the Court.

As to the first preliminary objection, it is a matter of fact, whether the petitioner was duly qualified or not, and that of course may be tried.

As to the second preliminary objection, we fail to see how the facts show any actual fraud in relation to placing the petitioner's name on the list of voters. The facts themselves seem to show that what was done was what really ought to have been done, and the complaint just amounts to this, that it was not done in the formal manner in which it ought to have been done. Apparently the only fraudulent thing about the matter is the word "fraudulent." At the time this petitioner had his assessment raised on the assessment roll from two to six hundred dollars, he was paying a rent which would indicate a larger value of the property than \$600; and there is nothing to show, at the time it was done, that any election was likely to occur for which a fraudulent change would be made. We think we should not go behind the voters' list to imagine fraud from the facts stated in this preliminary objection.

In the *North Victoria Case*, reference is made to the present state of our law on the subject. Some authorities seem to show that a party *bribing*, who is not a candidate, is not disqualified from voting

in consequence of violating the law in that respect. But if the petitioner was a duly qualified voter before and at the time of the election, and the only ground of disqualification is that he was guilty of treating, bribery and undue influence during the election, we hardly think that would destroy his right to be a petitioner.

The subject is referred to and discussed in the *North Victoria Case*, and we are not now prepared to decide against this petitioner on this preliminary objection.

We are inclined to think if the petitioner is a person who was duly qualified to vote at the election to which the petition refers, that is sufficient—that the fact that he may have done something at the election which would justify the Judge in striking out his vote, would not create such a disqualification as to destroy his status as a petitioner. It could not by relation be held to make him a person not duly qualified to vote at the election. Even in England, with the important clauses in the Corrupt Practices Act of 1854, and the Parliamentary Election Act of 1868, referring to this subject, which are omitted in our Acts, it is held that disqualifications do not arise until after the time the parties have been *found guilty* of the bribery.

In the late *Launceston Case* (reported in the *Times* newspaper), the Court of Common Pleas held that Col. Deakin's disqualification to be elected or sit in the House of Commons existed for the *next* seven years after he was found guilty. His election was declared void because the statute declares it shall be void, but the opposing candidate was not held to be elected, as would have been the case had the disqualification then begun which existed after he was found guilty.

The same penalty, under the English Act, attaches to any person other than the candidate *found guilty* of bribery in any proceedings in which, after notice of the charge, he has had an opportunity of being heard. The incapacity exists during the seven years next after the time at which he is found guilty.

And the sixth section of the English Act as to corrupt practices, directs the Revising Barrister, when it is proved before him that any person who claims to be placed on the list of voters has been *convicted* of bribery, etc., at an election, or that judgment has been obtained for a penal sum recoverable in respect of bribery, etc., against any per-

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son who claims to be placed on the list of voters for any county, he shall expunge his name from the list, if it be on the list, or disallow his claim to be put on the list. These statutes contemplate the party being found guilty before the penalties attach. The decision of Mr. Justice Blackburn in the *Bewdly Case*, in 1 O'M. & H. 176, is to the same effect as the latest case referred to in the *Common Pleas*.

As to the alleged champerty, if the petitioner could not enforce the alleged bargain that the persons known as the Liberal-Conservative Association made with him as to paying costs, that does not establish the fact that this petitioner has not a right to present a petition. His right arises from his being an elector, duly qualified to vote at the election, not from any interest acquired by virtue of a champertous bargain. It may be doubted whether a proceeding of this kind is one to which the ordinary rules relating to champerty can apply.

One of the latest cases I have seen on the subject is *Hilton v. Woods*, L. R. 4 Equity 432. There the plaintiff was not aware that he was the owner of certain coal mines until a Mr. Wright informed him of it. An engagement was finally made between him and Wright, that in consideration that he would guarantee the plaintiff against any costs, Wright should have a portion of the value of the property. It was contended on the argument that the bill must be dismissed on the ground that the agreement entered into between the plaintiff and Mr. Wright amounted to champerty and maintenance, and was an illegal contract. Sir R. Malins, V.C., in giving judgment, said:—"I have carefully examined all the authorities which were referred to in support of the argument (as to dismissing the bill,) and they clearly establish that wherever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services or otherwise. \* \* \* If Mr. Wright had been suing by virtue of a title derived under that contract, it would have been my duty to dismiss the bill. \* \* \* In this case the plaintiff comes forward to assert his title to property which

was vested in him long before he entered into the improper bargain with Mr. Wright, and I cannot therefore hold him disqualified to sustain the suit." He refused to dismiss the bill.

Here the petitioner's right is not acquired by virtue of any bargain with the Liberal-Conservative Association, and by analogy to the above case, even even if the alleged bargain were champertous, which I am by no means inclined to think it was, that would be no reason for staying the proceedings on this petition. See also *Carr v. Tannahill et al.* 31 U. C. Q. B. 210.

We do not consider that the objection, as stated, to the petitioner's right to vote at the election, and his consequent inability to petition, arises under the 71st section of the Ontario Act, 32 Vic., cap. 21, or a similar provision, section 3 in the *Corrupt Practices Act of Canada*, passed in 1860.

It is said that the fact that a third person was to pay the expenses of the petition, and had in fact paid for the last petition, was not considered to be any impediment to the hearing: *Lyme-Regis Case* P. R. D. 87; *Wolferstan* 44, 14.

As to the last preliminary objection, that the petition was not signed by the petitioner *bona fide*, it is stated in *Wolferstan on Elections*, 44, that where fraud was proven against the petitioner the petition was not heard: *Canterbury Case*, Cliff. 361. Such, it is presumed, would also be the decision in the case of a petition proved to have been signed *mala fide* by some person on behalf of the real petitioners: See *Sligo Case*, F. & F. 546. But the fact that a third person was to pay the expenses was not considered an objection to the hearing: *Lyme-Regis Case*, 1 P. R. & D. 37. At page 14 of the same work it is stated that if fraud or other improper influence has been used in obtaining the subscription of names to a petition, such a petition doubtless would not be proceeded with.

The result is, that as to the first preliminary objection, that is triable before the Election Judge as a matter of fact. The second preliminary objection is disallowed, as also the fourth, with regard to champerty. As to the fifth, it is a matter of fact whether he is the petitioner or whether any fraud has been practised on him. The mere fact that it has been agreed between him and others that he shall proceed with the petition in his name, and that they will contribute towards paying the expenses, can be no objection to the petition as we understand the law.

## LAW SOCIETY—EASTER TERM, 1874.

**LAW SOCIETY OF UPPER CANADA**

OSGOODE HALL, EASTER TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

JOSEPH EGBERT TERHUNE.  
 PETER MCGILL BARKER.  
 CHARLES EGERTON RYERSON.  
 ALFRED SUTTON BALL.  
 CHARLES EDGAR BARKER.  
 FRANK D. MOORE.  
 HARNUEL MADDEN DEROCHE.  
 CLARENCE WIDMER BALL.  
 E. GEORGE PATTERSON.  
 GEORGE LEVACK B. FRASER.

These gentlemen are called in the order in which they entered the Society and not in the order of merit. Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

JOSEPH JAMES GORMULLY.  
 E. GEORGE PATTERSON.  
 THOMAS HORACE MCGUIRE.  
 CHARLES EGERTON RYERSON.  
 DAVID ROBERTSON.  
 GEORGE LEVACK B. FRASER.  
 A. BAIL KLEIN.  
 ALFRED TREVOS BALL.  
 JOSIAH R. METCALF.  
 ARTHUR LYNDEHURST COLVILLE.  
 CLARENCE WIDMER BALL.  
 D. ELLIS McMILLAN.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

GEORGE ROBERT GRASITT.  
 JOHN MAXWELL.  
 WILLIAM SUTTON GORDON.  
 JAMES CRAIG.

*Junior Class.*

FRANK FITZGERALD.  
 DUNCAN DENNIS RIORDAN.  
 DAVID HALDANE FLETCHER.  
 ISAAC CAMPBELL.  
 JAS. W. HOLMES.  
 NICHOLAS DUBOIS BECK.  
 ARTHUR BRATTY.  
 JOHN SANDFIELD McDONALD.  
 JOHN ARTHUR PATRICK McMAHON.  
 WILLIAM JAMES LAVERY.  
 JOHN LEWIS.  
 ANDREW HALLIEY HUNTER.  
 JOHN JACOB WHEELER STONE.  
 JOHN GIBSON CURELL.  
 MAXFIELD SHERPARD.  
 GEORGE ALBERT FLETCHER ANDREWS.  
 WALTER JAMES READ.  
 THOMAS WILLIAM PHILLIPS.  
 NATHANIEL MILLS.  
 JOHN MALCOLM MUNRO.  
 JOHN JOSEPH BLAKE.  
 WM. EDGAR STEVENS.  
 CHARLES EGERTON MACDONALD.  
 COLIN SCOTT RANKIN.  
 CHARLES MICHAEL FOLNY.  
 JOHN GARRELY KELLY.  
 JOHN ROSS McCOLL, and  
 HENRY JOSEPH BRADY as an articled clerk.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition. Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. 1, Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1, Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Bees on Evidence, Smith on Contracts, Snell's Treatise on Equity the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLIARD CAMERON,  
 Treasurer.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR SEPTEMBER.

- 1 Tues..Selectors of Jur. meet (C. S. U. C. c. 31, s. 15).  
Last day for notice of trial for Co. Ct. York.
- 2 Wed..Capitulation of Sedan, 1870.
- 4 Fri..French Republic proclaimed, 1870.
- 5 Sat..Trin. T. ends. Last day to give not. for call.
- 6 SUN..14th Sunday after Trinity.
- 7 Mon..Loss of the *Captain*, 1870.
- 8 Tues..Gen. Sess. & Co. Ct. York. Last d. for J.P.'s  
to ret. [conv. to Clk. of P. (32 V. c. 6, s. 9 (4);  
32-33 V. c. [31, s. 76; 33 V. c. 27, s. 3.)
- 9 Wed..Sebastopol taken, 1855.
- 13 SUN..15th Sunday after Trinity.
- 17 Thurs..First U. C. Parliament met at Niagara, 1792
- 20 SUN..16th Sunday after Trinity.
- 21 Mon..St. Matthew.
- 22 Tues..1st day of Jewish year, 5634.
- 27 SUN..17th Sunday after Trinity.
- 30 Wed..St. Jerome.

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## THE

## Canada Law Journal.

Toronto, September, 1874.

What with the new circuits and the trial of the Election cases, the full strength of the newly arranged Courts will be taxed to the utmost. There has been a re-arrangement of the circuits, as will be seen in due course, and the time of trial for some of the Election Petitions has been fixed. They are, up to the time we write, as follows:

|  |          |
|--|----------|
| Essex Case.....                                      | Aug. 24. |
| Cornwall Case .. .                                   | Sept. 3. |
| London Case .. .                                     | " 7.     |
| Lincoln Case .. .                                    | " 7.     |
| South Renfrew Case (at Village of Ren-<br>frew)..... | " 8.     |
| North Renfrew Case (Court House, Pem-<br>broke) .. . | " 14.    |
| Addington Case .. .                                  | " 21.    |
| West Northumberland Case.....                        | " 25.    |

Before this reaches the hands of our readers, Trinity Term, which expired under the 18th sec. of 29 Vict., will have been electrified into life by the magic words of 36 Vict. cap. 8, sec. 53. We cannot say we rejoice at its reappearance from the tomb. It is a nuisance to the Bench and the Bar, and of no practical utility. Besides this it was so happily buried by a member of the Bar some years ago that we had hoped never to see its hoary head again. Many members of the profession will remember an exceedingly clever "Obituary Notice" of Trinity Term, written by the late Wm. Geo. Draper, Esq., County Judge at Kingston. It is quite too good to be lost, and the present time seems an appropriate one to reproduce it. It will be found on page 265



## DIGESTS OF ONTARIO REPORTS.

## \* DIGESTS OF ONTARIO REPORTS.

The New Digest, so long hoped for, is being issued in parts, and we have now the first part before us, containing the titles "Abandonment" to "Arrest," comprised in 104 full pages. It is supposed that the whole work will be complete in about fifteen parts, or about 1800 double column pages.

The first Digest of Upper Canada Reports was undertaken by the present leader of the Bar in Ontario and Treasurer of the Law Society, Hon. John Hillyard Cameron. He published a digest of cases from Mich. Term, 1828, to the end of the year 1843. Nine years afterwards Mr. R. A. Harrison, then a Student-at-law, published, under the supervision of James Lukin Robinson, the then Reporter to the Court of Queen's Bench, the volume known as Robinson & Harrison's Digest, containing all the cases from 1823 to the end of Vol. VII of the Upper Canada Reports—in a book of 530 pages, and including thirteen volumes of reports.

From about this period, and after the Courts of Common Pleas and Chancery were established, judicial decisions began to multiply, and after a few years there was again a demand for a new digest, or a continuation of the last one. Mr. R. A. Harrison, with his accustomed energy, determined to supply the want, but the pressure of other work induced him to hand over the arduous undertaking to Mr. Henry O'Brien, who in 1863 published the volume known as Harrison & O'Brien's Digest, which brought the cases down to the year 1861. This was a book

of 870 pages, and included no less than thirty-five volumes of reports.

This digest was a great relief to the profession, though it was thought by some that it would have been better to have combined with it the contents of the previous digest. It was intended by the Editor to follow it up by a similar publication every few years. This, however, was not done, as Mr. Christopher Robinson announced his intention of preparing a consolidated digest, which should include all the cases in the previous ones, as well as all which should appear up to the time of publication.

As we have said Mr. Harrison's digest contained the cases reported in thirteen volumes of reports, Mr. O'Brien's those in thirty-five volumes, and the present one will contain the cases reported in over one hundred volumes. These figures alone will give some idea of the amount of labour involved, and the extent of the work. It is somewhat curious to remark, *en passant*, that each succeeding digest has contained about three times as much matter as the preceding one.

It will be noticed as a very important feature in the new digest that the head notes of many of the cases have been condensed, and many of them re-written. It cannot be denied that to make a really good digest this was absolutely necessary, as in many volumes of the reports the head notes were not all that could have been desired.

This condensation of head notes and the grouping of cases, which decide practically the same point, strikes one at once as a great improvement on the former digests, as does also the fewness of the cross references, the necessity for which is obviated by repeating the head note where the matter of it is equally applicable to different subjects.

The whole plan and style follows closely that of Mr. Fisher's last digest, as

\* A Digest of the Reported Cases determined in the Courts of Common Law and Equity in Ontario from the commencement of the Reports in Trinity Term, 1823, to the present time, by Christopher Robinson, Esq., Q. C., and F. J. Joseph, Esq., Barrister-at-Law. Toronto: Rowell & Hutchison, 1874.

## TENURES AND CUSTOMS.

well in the arrangement of the cases as in typographical execution. Mr. Fisher's digest, as is well known, was founded on that prepared by the late County Judge of the County of York, Hon. S. B. Harrison, whose arrangement was doubtless the best that has as yet been published. Mr. Brunker also followed the same plan in Ireland.

In conclusion it may well be said that, so far as the first part of the book is concerned, the work which has been done has been done in a manner worthy of the high reputation of the Senior Editor, and which shows on the part of his co-worker, Mr. F. J. Joseph, great capacity for the scientific arrangement of cases, as well as the greatest accuracy, industry, and application.

We shall again have occasion to refer to this work, when it appears in the shape of a complete volume.

### TENURES AND CUSTOMS.

A new edition of Blount's "Tenures of Land and Customs of Manors," rearranged, corrected and considerably enlarged by W. Carew Hazlitt, has lately appeared. In it the legal lover of antiquarian lore may find much to amuse and interest, as well as to instruct and edify; and from the quaint and apparently frivolous tenures of medieval days, much that will explain and illustrate various points of social and economic history may be extracted. The rents paid, or rendered in those good old days of yore, show that neither the King nor the great lords had much to give their faithful followers save land; that land was of comparatively small value, that it was given away with lavish bounty in payment of every kind of service—military, menial or ceremonial, and that usually the rents bore no relation to the fertility of the soil, or its nearness to market.

Some of the rents and services for

which lands were held, mentioned by Blount are—taking charge of the King's table-cloths on coronation day; finding a spit of maple to roast the King's meat on that day; providing straw for his Majesty's bed, and grass and rushes for his chamber, whenever he chanced to come to Aylesbury; training a hare dog for the King, keeping a white bitch with red ears for the King; carrying the royal horn when his Majesty hunted within the hundred of Lambourne; scalding the King's hogs; keeping the King's lame dog; and, *O pudor! O tempora! O mores!* "keeping for the King six damsels, to-wit, w—o—s, at the cost of the King;" carving for the Earl of Lancaster at dinner on Christmas Day; paying to the Lord of the Manor a snowball at Midsummer, and a red rose on Christmas Day; driving a goose three times round the fire on New Year's-day, while the lord blows the fire. A supply of herring-pies were paid to the King for the Manor of Carlton, in Norfolk. The Manor of Downhall was held by a service of holding the King's stirrup when he mounted his horse at Cambridge Castle. The Lords Grey of Wilton held the Manor of Acton by the serjeanty of keeping one ger-falcon for the King. In the time of Henry III., one Robert Aquillan held a carucate of land by the service of making one mess in an earthen pot in the King's kitchen on the day of his coronation. Henry de Greene held lands of the King, *in capite*, by the service of lifting up his right hand yearly on Christmas Day towards the King whenever he should be in England; and William Hunt held lands of the Earl of Lincoln, free from all services and demands except one rose in the time of roses.

Among the customs which have prevailed in the various Manors, many are most curious, fanciful and grotesque. In Rochford, in the County of Essex, at

## THE CASE OF THE CAROLINE REVIEWED.

the cock's crowing on the Wednesday after Michaelmas Day, a court was held by the Lord of the Manor of Staleigh, called the Lawless Court. At it the steward and suitors speak not above a whisper, no candles are used, pen and ink are forbidden, but a record of proceedings is kept with a coal; and the unfortunate who owes suit or service thereto and appears not, forfeits to the Lord double the rent for every hour he is absent. If the young men of Coleshill, in the County of Warwick, can catch a hare and bring it to the parson of the parish before ten o'clock on Easter Monday, his reverence is bound to give them a calf's head, and one hundred eggs for their breakfast, and a groat in money. Robert Fitzwalter, a well-beloved subject of King Henry, the third of that name, as death drew nigh, betook himself to prayer and deeds of charity, gave great and bountiful alms to the poor, kept great hospitality, and rebuilt the priory of Dunmow. Here arose the custom, that any man or woman who repented not of his or her marriage, either sleeping or waking, in a year and a day, might lawfully claim a gammon of bacon, which was presented with all the solemnity and triumphs that they of the priory and town of Dunmow could desire. The party claiming the bacon had to take his oath before prior and convent, and the whole town, humbly kneeling in the church-yard upon two hard, pointed stones; his oath was administered with such long process and such solemn singing over him as doubtless made his pilgrimage rather painful; afterwards he was hoisted aloft on the shoulders of the men, and carried first about the priory church-yard and then through the town, with all the friars and brethren and all the townsfolk following with shouts and acclamations, and with the hard-won bacon borne aloft in triumph. The Lord of the Manor held his lands by the tenure of giving the bacon to all applicants, but only six claim-

ants are recorded between 1444 and 1751, which fact does not argue well for domestic felicity in those early days.

## THE CASE OF THE CAROLINE REVIEWED.

We have often had occasion to quote from the pages of the *Central Law Journal*, which, under the editorship of Judge Dillon, is one the very best of our United States exchanges. In a number of that paper published last month, there is a very learned *critique* upon a pamphlet, written by George Ticknor Curtis, touching the case of the *Virginus*. The learned reviewer adverts, in common with his author, to the destruction of the *Caroline*, and proceeds to make some important comments upon the law, propounded in the case which grew out of that affair—*The People v. McLeod*, 1 Hill, N. Y. 337. The *Central Law Journal* proceeds as follows, first giving a history of the transaction, and then going on to demolish the law as laid down by Mr. Justice Cowen, who delivered the opinion of the Court:

This case was determined in the Supreme Court of New York in 1841, before Chief Justice Nelson and Justices Bronson and Cowen, all able and distinguished Judges. It is note-worthy in this connection from the fact that Mr. Justice Cowen, who delivered the opinion of the court, attempted to answer the assertion of the British Government that the destruction of the *Caroline* was a necessary act of self-defence.

The facts of the *Caroline* case were substantially as follows: In the winter of 1837-8, during Mackenzie's rebellion in Canada, and while the United States and Great Britain were at peace with each other, a body of armed men, mostly Americans, took possession of Navy Island, in the Niagara river, an island belonging to Great Britain, and, having fortified their position, kept up for several weeks a frequent bombardment against the position occupied by British forces on the Canadian shore. An American steamer, the *Caroline*, plied regularly between Navy Island and Schlosser, on the American side of the river, furnishing the armed forces on the Island with supplies and stores, and keeping up a communication between them.

## THE CASE OF THE CAROLINE REVIEWED.

and the American shore. About midnight of the night of December 29-30, a party of British troops, under command of Colonel Allan McNabb, proceeded in small boats in search of the *Caroline*, found her fastened to the dock at Schlosser, in the State of New York, made a hostile attack upon her, expelled her crew, set fire to her, and she floated in full blaze over the great falls. In the skirmish, one Amos Durfee, a person employed on the *Caroline*, was killed, and for his murder, nearly two years afterward, one Alexander McLeod, a British subject, was indicted by a grand jury in Niagara county, New York. McLeod having been arrested and confined in jail, the British minister, Mr. Fox, in a note to Mr. Webster, the American Secretary of State, (March 12, 1841), demanded his immediate release on the ground that the act in which he was engaged was one of a public character, "planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps or to do any acts which might be deemed necessary for the defence of Her Majesty's territories and for the protection of Her Majesty's subjects, and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the tribunals of any foreign country."

In the meantime McLeod was brought before the Supreme Court of New York, under a writ of *habeas corpus*. Here the prisoner brought to the notice of the court, by affidavits and exhibits, the character of the *Caroline*, and of the expedition which destroyed her, as well as the demand of the British Government for his release.

The case was argued with great ability by counsel, and many precedents and authorities were cited. The judgment of the court was finally pronounced by Mr. Justice Cowen, who argued the question involved at great length, displaying throughout his opinion the clearness of intellect for which he was distinguished, and the exhaustive research which was his habit. Referring to the demand of the British Government for the surrender of the prisoner, he said:

"She puts herself, as we have seen, on the law of *defence* and *necessity*, and nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which alone can tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The right

of self-defence and the defence of others, standing in certain relations to the defender, depend upon the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to enquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, (3 Black. Com. 4), that to warrant its exertion at all, the defendant must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the *defender* would himself become the *aggressor*." The condition upon which this right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition or those limits. The *Caroline* was not in the act of making an assault upon the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever he could find her, and were, in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants and their attack might have been legally repelled by Durfee, even to the destruction of their lives."

Further on Mr. Justice Cowen quotes from Puffendorf the rule applicable to cases of private or mixed war, as follows: "If the adversary be a foreigner, we may resist him and repel him any way, at the instant he comes violently upon us; but we cannot, without the sovereign's command, either assault him while his mischief is only in *machination*, or revenge ourselves upon him after he hath performed the injury against us." Puff. b. 2, chap. 5, § 7. "The sovereign's command must," adds the learned Justice, "in order to warrant such conduct, be a *denunciation* of war."

McLeod was accordingly remanded to take his trial in the ordinary course of law, and was tried and acquitted, having proved an *alibi*.

Notwithstanding the deference which is to be paid to the opinion of so eminent a judge, it is believed that the grounds taken by him in the language above quoted, are to a great extent fallacious.

## CRITICISMS ON TEXT WRITERS, REPORTERS, &amp;c.

1. In the first place it is to be observed that the juncture of circumstances which can alone tolerate the action of the law of self-defence, is by no means as clearly defined—at least in the United States—as the learned justice states it to be. It is true, that on the one hand, we find the rule stated in many cases, that the danger which alone will warrant a person in striking in his defence must be *impending* and about to fall at the time the act of defence is resorted to, or, at least, this must be apparent to the comprehension of a reasonable man: *People v. Sullivan*, 3 Selden, 396; *Harrison v. State*, 24 Ala. 67; *Creek v. State*, 24 Ind. 151; *Shorter v. People*, 2 Comst. 193; *Logue v. Cowe*, 2 Wright, 265; *State v. Scott*, 4 Ired. 409; *Dyson v. State*, 26 Miss. 362; *Cotton v. State*, 31 Miss. 504; *Wesley v. State*, 37 Miss. 327; *Evans v. State*, 44 Miss. 762; *Head v. State*, 44 Miss. 731; *Rippy v. State*, 2 Head, 217; *Williams v. State*, 3 Heiskell, 376; *Lander v. State*, 12 Tex. 462. These cases state the general rule, and the application of it is, of course, in criminal trials, left to the jury. So, it has been said, that the right of attack for the purpose of defence does not arise until the person defending has done everything in his power to avoid its necessity. *People v. Sullivan*, *supra*; *State v. Shippey*, 10 Minn. 223. On the other hand, the doctrine of these last two cases is distinctly repudiated in three cases in Kentucky, where it is held that a person who has once escaped from assassination at the hands of a desperate and persevering enemy, may kill such enemy whenever and wherever he may chance to meet him, so long as such enemy gives evidence that his murderous purpose continues: *Phillips v. Com.* 2 Duval, 328; *Carico v. Com.* 7 Bush, 124; *Boannon v. Com.* 8 Bush, 481. And in three other well considered judgments, it has been declared that no general rule on the subject applicable to all cases can be laid down, but that each case must depend to a great extent upon its own exigencies: *Ottom v. State*, *supra*; *Patterson v. People*, 18 Mich. 330, 334; *Jackson v. State*, Supreme Court Term, 1873.

2. If no settled rule can be laid down in advance which shall determine the exigencies in which a person will be permitted to strike in his private defence, the attempt to apply to a state of private or mixed war the rules which are supposed to be settled in regard to private defence, must be entirely fallacious. Thus, in a state of civil society, we say, as was said by Mr. Justice Cowen in the case we are considering, that the right to strike in one's defence does not arise when the threatened danger exists

in *machination* only; because, at this stage of the danger, it is always possible to appeal to the preventive arm of the law. But a state of war, be it public, private or mixed, brings with it an accumulation of mischief which the civil law is utterly powerless to prevent; and hence, in such cases the defender must be supposed to be remitted to a state of nature in respect of his right of defence: and in a state of nature, where there is no law to which the defender can appeal for prevention, it cannot be possible that he is obliged to sit passively and watch his enemy while he compasses his destruction, instead of attacking that enemy during his work of preparation. The principle laid down by Dr. Rutherford, as applicable to *defence of life* in a state of nature, would seem to be the reasonable and consistent rule to apply to such cases. He says: "The law [*i.e.*, the law of nature] cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." But he shows that in a state of civil society he is obliged first to appeal to the civil magistrate before he can lawfully strike in defence against a mischief which is only in preparation: *Ruth*, Inst. b. 1, chap. 16, § 5.

The principles insisted on by Mr. Justice Cowen would have required Col. McNabb to attack the Caroline in his open boats in the middle of the Niagara river, or while moored under the guns of Navy Island, and to capture her, if at all, at a useless expenditure of the lives of his men; and this to satisfy a punctilious rule of supposed law, devised by some casuist in his library!

### CRITICISMS ON TEXT-WRITERS, REPORTERS, AND OTHER LEGAL AUTHORITIES.

We now furnish our last instalment of judicial observations and comments on the merits and demerits of reporters and text-writers. We hope yet to see a treatise—the product of some able lawyer's learned leisure—which shall form a dictionary of reference to the works on English law and indicate their respective value and importance. Meanwhile we throw another stone upon the pile of materials which must be accumulated by many hands before such a volume is possible.

## CRITICISMS ON TEXT WRITERS, REPORTERS, &amp;c.

**KAIMES, LORD.** "His extreme inaccuracy in what he ventures to state with respect both to the ancient common law and the modern English law, tends not a little to shake the credit of his representations of all law whatever." Per Sir William Scott, in *Dalrymple v. Dalrymple*, 2 Hagg. Con. R. 92.

**KEBLE'S REPORT** (Third Volume). "I hold that to be a book of no great authority." Per Ashurst, J., in *Atkins v. Davis*, Cald. R. 332.

**KELYN'S REPORTS.** "For the case of the Regicides I refer to Sir John Kelyng's report; and, though that is a book which can never be referred to without reprobating the course which appears there to have been taken, of Judges and Crown Counsel meeting together to settle, revise, and rule beforehand the points of the trial, yet these resolutions have subsequently received the stamp of the highest authority; and we must not forget that the book was edited by Lord Holt, and the preface written by him." Per Fitzgerald, J., in *Mulcahy v. Regina*, Irish R. 1 C. L. 64.

**LEONARD'S REPORTS** (Third Volume). In referring to these reports Nottingham, L. C., says: "which, by the way, is the best book of reports of the later ones that hath come out, without authority" [i. e. without the *imprimatur* of the judges]. *Duke of Norfolk's Case*, 3 Chan. Ca. 49.

**LUSH'S PRACTICE.** "A very able book of practice." Per Coleridge, J., in *Downes v. Garbett*, 7 Jur. 800.

**MANNING, MR. SERJEANT.** His note to *King v. Wilson*, 5 M. & R. 156, is recognized in *Longford v. Selmes*, 8 Kay & J. 220.

**MITFORD ON EQUITY PLEADING.** "Lord Eldon, I recollect, said of Lord Redesdale's Treatise on Pleading, that it was not surprising that there should be some mistakes in it, but it was surprising that there should be so few." Per Stuart, V. C., in *Conduitt v. Soane*, 4 Jur. N. S. 504.

**MOLLOY.** "Not usually placed in the first class of authorities upon maritime subjects." Lord Stowell, in *The Neptune*, 1 Hagg. Adm. R. 231.—"Almost anything can be proved by citations from Molloy." Per Lord Mansfield, C. J., in *Goss v. Withers*, 2 Burr. 690.

**NOTES OF CASES.** Referring to *Re Wedge*, 2 No. of Ca. 14, and *Jane Taylor's Case*, 4 Ib. 290, Warren, J., observes: "Reports of *ex parte* motions, where the assets are

inconsiderable, and where the argument of counsel was, that because an ambiguity was patent the Court might take extrinsic evidence, are not of much authority." *Sullivan v. Sullivan*, 1r. R. 4 Eq. 462.

**NOY.** "I wholly reject as only an abridgment of cases, per Serjeant Noy says when a student." Per Twisden, J., in *Freeman v. Barnes*, 2 Keb. 652.

**OLD REPORTERS.** "It is objected that these are books (Freeman and Keble) of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree." Per Mansfield, C. J., in *Rea v. Genge*, Cowp. R. 16.—"The inaccuracy of the early reports should be guarded against." Sugden on Powers, p. 185, No. 81, n. 1.—"As to Equity pleading, the old cases occurring at a time when the Courts were very strict in matters of pleading, are very valuable on the subject" (reference to *Godbolt v. Watts*, 2 Arstr. 543): Per Wood, V. C., in *The United States v. McRae*, L. R. 4 Eq. at p. 338.

**POTHIER.** "He is as high an authority as can be had, next to the decision of a court of justice." Per Best, J., in *Cox v. Tray*, 5 Barn. & Ald. 480.

**PRECEDENTS OF PLEADINGS.** "Where they are all the one way, they ought to be considered as great authority; but where there are a variety one way and the other, they are not of so much weight." Per Burton, J., in *Barry v. McDowell*, 5 Ir. L. R. 351.

**POSTLETHWAITE.** "A very accurate writer on commercial subjects." Per Lord Stowell, in *The Matchless*, 1 Hagg. Adm. R. 100.

**REDFIELD ON RAILWAYS.** "A book very ably written." Per Martin, B., in *Shepherd v. Bristol R. R.*, L. R. 3 Exch. 196.

**SELDEN'S TABLE-TALK** "cannot be considered any authority on points of law." *De Haber v. Queen of Portugal*, 17 Q. B. 171.

**SHEPHERD'S TOUCHSTONE.** "It is a work of very high authority, and contains the cream of Coke upon Littleton." Warren's Law Studies.

**WYATT'S PRACTICAL REGISTER IN CHANCERY.** "Not a book of authority, but it is better collected than most of the kind." Per Lord Hardwicke in *Davis v. Davis*, 2 Atk. 22,

## JUDICIAL ERRORS.

## SELECTIONS.

## JUDICIAL ERRORS.

What honest man, asks George Eliot, does not feel rather tickled than otherwise on being taken for a housebreaker? Nay, how innocent soever he be, let him tremble. For, in the words of Chief Baron Pollock, "The annals of our criminal courts, unhappily, record many various instances where, by perjury or mistake (especially as to identity), by blunder or misapprehension, and sometimes by the misconduct and fatal indiscretion of the accused himself, a conviction has taken place which has been considered, upon further investigation, to be erroneous." One is panic-stricken, and takes to flight—

His flight was madness : when our actions do not,  
Our fears do make us traitors.

Another, overwhelmed by the insensate impulse of some strange mischance, confesses. Fatal error! In vain would he

Unspeak his own detraction, here abjure  
The taints and blame he laid upon himself.

And how many, paralysed in the coils of immitigable circumstance, have perished the victims of judicial errors! It may, indeed, be hoped that now-a-days instances of such fatal misprisions of justice are extremely rare. The reaction produced in the public mind, in the early part of the present century, by the occurrence of cases of wrongful conviction, such as that of Eliza Fenning, and by the increased sense of the value of human life, still operates beneficially. And not only is the law more humane, but those who administer it are now more cautious. Yet are we warned from time to time, by startling exceptions, that no precaution can be too great, and that whatever protection against error is afforded by the law of evidence cannot be too unswervingly sustained. It is not very long since that two brothers were sentenced to death in the county of Limerick—and one of them hanged—for a murder which was afterwards, in time to save the other brother, confessed by another criminal, who was himself under sentence of death for a different murder. We have not yet forgotten how Pelizzioni was sentenced to be hanged for a murder of which he was guiltless, and for which he would have been hanged but for the persevering exertions of Mr. Negretti. And it was but in 1869 that Bisgrove and Sweet were convicted, when, had it not been

for the timely compunction of Bisgrove, Sweet, though wholly innocent, would have been hanged. In the same year an extraordinary case of a judicial error was brought to light by an appeal before the Imperial Court of Nancy. Adèle Bernard, a girl twenty-two years of age, had been brought to trial, in 1868, on a charge of infanticide. The prosecution alleged that in October, 1868, she clandestinely gave birth to a child and threw it into a pigstye, where it was eaten. This allegation was confirmed by her own confession both before the Judge of Instruction and in open court. Moreover, a midwife and a parochial surgeon certified that they examined her immediately after her arrest, and found traces of recent delivery. On this evidence the correctional tribunal sentenced her to six months' imprisonment for the concealment of the birth of a child who was not proved to have been born alive. She went to prison accordingly, and about a month later, on December 24, she was delivered of a fine healthy child, perfectly formed, and born in altogether normal conditions. The time allowed for her appeal against a sentence which circumstances appeared to show was manifestly unjustifiable had then expired, but the public prosecutor lodged an appeal in her interest. When interrogated by the president of the Appeal Court, she said that she had been induced to make a false confession by her mother and the midwife, who told her that if she confessed the crime she would get off easily, whereas if she persisted in denying the accusation she would certainly be condemned to fifteen or twenty years' imprisonment with hard labour. Some medical evidence was produced before the Court of Appeal to show the bare possibility of a superfetation. But the Court rejected this hypothesis; held that she had been impelled by intimidation to make a confession for which there was no foundation; and reversed the verdict against her. One is reminded of the similar case of Madame Doize, an innocent woman who had been driven to confess herself guilty of a murder in order to get released from the torture of solitary confinement.

O white innocence,  
That thou shouldst wear the mask of guilt to  
hide  
Thine awful and serene countenance  
From those who know thee not!

## JUDICIAL ERRORS.

The case of the conviction of the Boorn brothers for the murder of Russell Colvin is pretty well known from the statement in "Greenleaf on Evidence." But a full report of it\* has recently been published by one of the counsel at the trial, taken from the minutes of Chief Justice Chase, who presided at the trial (uncle of the late Chief Justice of the United States). In 1812 Barney Boorn, his wife, two sons, Stephen and Jesse, a daughter, and her husband, Russell Colvin, lived in the town of Manchester, Vermont. Colvin was a man of weak intellect, at times partially insane, and accustomed occasionally to wander away for weeks without giving an account of himself. In May, 1812, he suddenly disappeared. But now years went by and he came not back. Suspicion became rife. It was remembered that the brothers Boorn and Colvin had not lived amicably together; and it was reported that one of the brothers had stated that Colvin was dead, and the other that "they had put him where potatoes would not freeze." An uncle of the young men dreamed three times that Colvin came to him, and indicated that his remains lay in an old cellar hole, used as a place for burying potatoes. Then a hat was found near the homestead, and recognised as Colvin's; and next, some bones were dug up out of a hollow stump on the property, and pronounced to be human bones. Accordingly, in 1819, the brothers were arrested. Mr. Sargeant says:—"The country was scoured for evidence. The old cellar hole was re-opened, and a large knife, a pen-knife, and a button were found. The large knife and button were identified as having belonged to Colvin. The bones found in the hollow stump were brought into court, and four physicians were called, who, after an examination, pronounced them to be the bones of a human foot, together with some toe-nails, and perhaps a thumb-nail. One of the physicians, who lived in Arlington, after thinking the matter over, concluded there might, after all, be a doubt about it, and on examining a human skeleton at home was convinced that he had been mistaken, and the next day went into court and

retracted his former statement. The other physicians were not satisfied, and to settle the matter sent to a neighboring town and had a leg that had been amputated and buried, exhumed and brought into court, and on comparing the two specimens, every one was convinced that the bones alleged to be Colvin's were not human. This dampened the public ardour somewhat, and it is probable that Jesse would have been discharged, but that on Saturday he made a statement that he believed Colvin had been murdered, and that his brother Stephen was the murderer; that Stephen had told him the previous winter, that he (Stephen) and Colvin were hoeing in what was called the "Glazier lot;" that they had a quarrel, and Colvin attempted to run away; that he struck him on the back part of the head with a club, and fractured his skull; that he (Jesse) did not know what had become of the body, but mentioned several places where it might be found. In September following, an indictment was found against both the brothers, the principal witness being a fellow-prisoner, who testified that Jesse had made a confession to him one night after awaking much disturbed. After the indictment was found they were visited in gaol by men of character and influence, and men of the law, who declared that the case was clear against them, but that if they confessed an attempt would be made to have their sentence commuted. Thereupon, Stephen made a written confession (coinciding in its general substance with what circumstantial evidence there was) that he killed Colvin, adding that it was done in a quarrel, and in self-defence—but the sequel shows how inconclusive may be even a written "death warrant" extracted from the self-condemned. The trial took place in November. The evidence against them was wholly circumstantial, and mostly unimportant, with the exception of the confessions. A verdict of murder was returned, and they were sentenced to be executed on January 28, 1820—all efforts failing to secure a commutation. They then protested their innocence; and an advertisement was inserted in the newspapers, asking information respecting Colvin. On November 29, 1819, it attracted the notice of Mr. Chadwick, of New Jersey, who recognised the description as that of a man living at Dover, in his

\* "The Trial, Confession, and Conviction of Jesse and Stephen Boorn for the murder of Russell Colvin, and the return of the man supposed to have been murdered." By Hon. Leonard Sargeant, ex-Lieutenant-Governor of Vermont. Manchester: D. K. Simonds, 1873.



## A DISQUISITION ON NAMES.

State. The man was brought to Vermont, and at once recognised and identified by scores of people as the veritable Colvin. He was partially insane and could give no reason for his absence, but freely admitted that the Boorns had neither hurt him nor frightened him away. The Boorns were released, although the Court was at a loss to know what course to pursue for the purpose.

We have selected these cases, and presented the facts in detail, for the purpose especially of illustrating the expediency of upholding a doctrine, that a conviction should not be had merely upon the confession of the prisoner without any other proof of the *corpus delicti*—a doctrine which has been recently questioned in the case of *Regina v. Unkles*, 8 Ir. L. T. R. 38.—*Irish Law Times*.

## A DISQUISITION ON NAMES.

The case of *Kinnersley v. Knott*, 7 C. B. 980; 18 L. J. C. P. 281, has long been quoted as a solemn adjudication on questions of misnomers in pleadings; but now that the ancient strictness in pleading, even at common law, is no longer insisted upon, the most valuable portion of that case must be regarded to be that portion of it which does not appear in the reports, but which has been furnished us through the courtesy of Professor Ordronaux, State Commissioner in Lunacy:

In this case the plaintiff, as indorser of a bill of exchange of £65 10s., brought an action against the defendant as the acceptor, and declared against him by the name of "John M. Knott," being that by which he had signed the note, but without stating in the declaration that the defendant had so signed it. To this declaration the defendant demurred specially, and assigned as the ground of his demurrer that the declaration had not properly set forth his Christian name, nor assigned any reason under statute 3rd and 4th Wm. IV., ch. 42, for not doing so.

Mr. Serjeant Talfourd, on behalf of the defendant, said their lordships were often told that a case rested on a word, but here it rested on a letter only. It was his duty to contend, both upon principle and precedent, that this was a good ground of demurrer. The court had decided that the letter "I," being a vowel and capable of pronunciation, might be

taken to be a Christian name, but they had at the same time intimated that such would not be the case with a consonant, which, as it could not be sounded alone, would be deemed to be not a name but an initial letter only. Now, in this case, "M" was plainly an initial letter, for it could not be pronounced by itself. Standing by itself, therefore, it meant nothing. He was sure a very eminent authoress (Miss Edgeworth), whose loss they had recently to lament, was of opinion that all the letters of the alphabet, by the mode in which they were explained, were rendered little more (to use judicial language) than a "mockery, a delusion, and a snare"—that A B C D, etc., meant A B C D, etc., and nothing more; but even if it would avail him, he feared his friend could not rely upon such authority.

The Lord Chief Justice: You say the "M" means nothing—then let it mean nothing. Would a scratch be demurrable?

Mr. Serjeant Talfourd: I say that "M," by itself, cannot be pronounced and means nothing; but here it does mean something, which something ought to have been stated or explained under the statute. Suppose a person of the name of John Robbins, the court would surely hold a declaration bad which described him by the word John and figure of the red-breast? In like manner the court would hold this declaration bad because it either put a sign for one of the defendant's names or described it by the initial letter. A consonant by itself was a mere sound without meaning. The letter H, indeed, by the custom of London and some other places, was no sound at all [laughter], though elsewhere it often protruded itself on all occasions. [Renewed laughter.]

Mr. Justice Maule: I had a policeman before me as a witness the other day, who told me he belonged to the "hen" division, and it was not until at some farther stage in the case that I discovered it was not a division designated by the name of a bird, but by "N," the alphabetical letter. [Great laughter.]

Mr. Serjeant Talfourd: It will probably be contended that this person might have been christened in the manner that the bill is signed, but I submit that the court will not intend that. It is true, we often hear of absurd Christian names, and

## A DISQUISITION ON NAMES.

I myself remember when many persons insisted upon having their children christened "Sir Francis Burdett."

Mr. Justice Maule: I remember a very learned and ingenious argument by Mr. Jardine, when I sat in the Court of Exchequer, by which he proved to the satisfaction of the court, that the Christian name is the real name, and the surname is only an addition; that in the case of John Stiles, for instance, John is the real name, but Stiles was originally added only because the ancestor lived near one.

Mr. Serjeant Talfourd: Then having, I hope, convinced the court that "M" by itself cannot be a name, and means nothing, I submit it must be understood as an initial, and therefore that it ought to have been so stated.

Mr. Justice Maule: Pleadings are in writing, therefore the law presumes that the court can read and know its letters. Vowels may be names, and in "Sully's Memoirs" a Monsieur D'O. is spoken of; but consonants cannot be names alone, as they require, in pronunciation, the aid of vowels.

Mr. Serjeant Talfourd: Yes; but in the case of consonants they are taken to be but initials when used alone in law and literature. Throughout the ponderous volumes of Richardson's novels, for instance, we find persons spoken of in this manner. In "Clarissa Harlowe," for instance, "Lord M." is mentioned throughout four volumes, but it could never be understood that this was the real name, or anything more than an initial. Again, an author well known to the Lord Chief (Charles Lamb) wrote a farce entitled simply "Mr. H.," but the whole turns upon this being the initial only of a name he wished to conceal. In his prologue to it he humorously says:

"When the dispensers of the public lash  
Soft penance give; a letter and a dash—;  
When vice, reduced in size, shrinks to a failing,  
And loses half her progress by curtailing,  
*Faux pas* are told in such a modest way,  
The affair of Colonel B— with Mrs. A—,  
You must forgive them; for what is there, say,  
Which such a pliant Vowel must not grant  
To such a very pressing Consonant?  
Or who poetic justice dares dispute  
When, mildly melting at a lover's suit,  
The wife's a Liquid, her good man a Mute."

And he concludes by an appeal to the consequences of this "mincing fashion," which (said the learned serjeant) I trust will have great weight with your lordships, for he adds—

"Oh should this mincing fashion ever spread  
From names of living heroes to the dead,  
How would ambition sigh and hang the head,  
As each loved syllable should melt away,  
Her Alexander turned into great A,  
A single C her Cæsar to express,  
Her Scipio sunk into a Roman S—  
And nick'd and dock'd to this new mode  
of speech,  
Great Hannibal himself to Mr. H—."

The learned serjeant then cited and argued upon a variety of cases on this side of the question, and submitted that their lordships ought to decide in favour of his client.

Mr. F. Robinson, on behalf of the plaintiff, said he did not deny the right of every Englishman to be called by every name given him at his baptism; but he submitted that before he claimed to be privileged on that account, he must show that his privilege has been invaded. Here it was assumed throughout that the "M" in the name "John M. Knott," was an initial letter, but he believed there were instances in which persons had been christened in this remarkable way in this country. He was told there was lately a bank director who was christened "Edmond R. Robinson;" but were it otherwise in this country, did it follow that in no other country, Jew, Turk, or heathen might not use such names? If, however, it were an initial letter, why did not his friend apply to have the right name substituted? If it were a misdescription, it was pleadable in abatement. Such a name might originate from an error of the clergyman at the christening.

The Lord Chief Justice: In the upper circles of society it is customary to hand in the name in writing, which prevents mistake.

Mr. Justice Maule: The practice of the circles with which I am conversant was, and I believe is, to give the name verbally. There was, however, a gentleman, the sheriff of one of the counties I went through on circuit, Mr. John Wanley Sawbridge Erle Drax, whose name was probably handed in. [Laughter.]

Mr. Robinson: There are many Scotch and French names, such as M'Donald, M'Taggart, D'Harcourt, D'Horsey—how are such names, to be set out in the pleadings? Suppose, again, a man's name were the name of a river, as X?

Mr. Justice Maule: But that is not

Elec. Court.]

EAST TORONTO ELECTION PETITION.

[Elec. Court.

apelt so : it is *idem per idem*, X for ex. Beer, I believe is sometimes called X, but not water. [Laughter.]

Mr. Robinson : There are some of our names which are precisely those of letters, as Gee, Jay, Kay, etc.

Mr. Justice Maule : But here it is not *sonans*, only *consonans*, and they can not be sounded without other letters.

Mr. Robinson : Their lordships should remember the existence of a publication called the *Phonetic Nuz*, and unless they meant to give a "heavy blow and great discouragement" to that rising science, he hoped they would not decide against his client. [Laughter.] But he had seriously to submit that by demurring to this declaration the defendant admitted, on legal principles, that his name was that which was stated in the declaration.

Mr. Justice Creswell referred to and distinguished this case from the case of *Roberts v. Moon*, in 5 Term Reports, where a plea in abatement of misnomer, beginning "and the said Richard, sued by the name of Robert," was held bad.

Mr. Justice Maule suggested that as £65 10s. depended on the question, it would be better for plaintiff to amend.

Mr. Robinson declined to do so, and contended no case could be cited directly in support of the demurrer, and therefore that the court should decide in favour of the plaintiff.

Mr. Serjeant Talfourd having replied,

The Lord Chief Justice : The various stages in the argument in this case have been already discussed and decided. The courts have decided that they will not assume that a consonant letter expresses a name, but they will assume it expresses an initial only ; and they further decided that the insertion of an initial letter instead of a name is a ground of demurrer, and is not merely irregularity. In the case of *Nash v. Collier*, this court decided that a demurrer to the declaration which describes the defendant's name as Wm. Henry W. Collier was not frivolous, and gave a strong intimation, which the plaintiff had the good sense to attend to, that he ought to amend his declaration. That decision was acted upon by the Court of Exchequer in the subsequent case of *Miller v. Hayes*, and as it appears to me the case is precisely similar to the present, I think we must decide in favour of the demurrer.—*Pittsburgh Legal Jour.*

## CANADA REPORTS.

## ONTARIO.

## ELECTION CASES.

[Before RICHARDS, C. J. ; SPRAGGS, C. ; and HAGARTY, C. J. C. P.]

## EAST TORONTO ELECTION PETITION.

WOODHOUSE, *Petitioner*, v. O'DONOGHUE, *Respondent*.

*Hiring teams—Corrupt practices—Bribery.*

*Held*, (1). That the hiring of teams, &c., is not a "corrupt practice" within the meaning of sec. 3 of Controverted Election Act, 1873, unless the hiring amounts to bribery.

2. That the words "Act of the Parliament of Canada" in that section refer to an Act of the Dominion of Canada.

[Election Court—June 20, 1874.]

The petitioner alleged, in the eighth clause of his petition, that the respondent, during the election, hired cabs and other vehicles to carry voters to and from the polls, and that owing to such hiring the election was void.

The respondent took a preliminary objection to this clause on the ground that the allegation was immaterial in this, that it would not, even if true, avoid the election.

A summons being obtained to strike out the clause objected to,

*Bethune* supported it. The hiring of teams or cabs does not make the election void. That is only an illegal act under the 3rd section of the "Corrupt Practices Prevention Act, 1860," and does not come within the meaning of the 3rd section of the "Controverted Elections Act, 1873," that section confining the offences to those defined by "Act of the Parliament of Canada." The "Act of the Parliament of Canada" there referred to meant the "Act of the Dominion of Canada." The hiring of cabs and vehicles in England is not a "corrupt practice." *Staley-bridge case*, 1 O'M. & H. 66.

*Till*, for petitioner, showed cause. The hiring of cabs and vehicles as mentioned in the 3rd section of "The Corrupt Practices Prevention Act, 1860," being an illegal act, comes within the meaning of the words "corrupt practice" mentioned in the 3rd section of the "Controverted Elections Act, 1873." In any case the payment of an excessive sum would amount to bribery, and if so, the clause ought not to be struck out.

RICHARDS, C. J.—We think the hiring of cabs and vehicles is not a "corrupt practice" within the meaning of those words in section 3 of the "Controverted Elections Act, 1873." The "Act of the Parliament of Canada" there

Elec. Court.]

NIAGARA ELECTION PETITION.

[Ch. Cham.]

mentioned refers to an "Act of the Dominion of Canada." But the clause will not be struck out, as the hiring might amount to bribery, and the petitioner should have the right to give evidence under it for that purpose.

SPRAGGE, C., and HAGARTY, C.J., concurred.

#### NIAGARA ELECTION PETITION.

BLACK ET AL, *Petitioners*, v. J. B. PLUMB, *Respondent*.

*Form of recognizance—Signature of Sureties not requisite.*

The recognizance filed in this case was in the usual form, but was not signed as directed by Rule 24 of the General Rules of the Election Court.

Held, that the recognizance was nevertheless valid.

[Election Court—June 26, 1874.]

A summons was obtained from the Clerk of the Election Court to set aside the recognizance filed herein, and to stay proceedings on the petition, on the ground (amongst others) that the alleged recognizance was void and insufficient, because it was not signed by the persons purporting to enter into it, pursuant to Rule 24 of the Election Court.

Hodgins, Q.C., for the petitioner, showed cause. The security to be given is a recognizance, and is so called in the Act and Rules. The requirements of a recognizance are well understood, and it is not one of them that the persons to be bound by it should sign it, the acknowledgment and taking being sufficient: Burns' Justice, Vol. 5, p. 71; *The Queen v. St. Albans*, 8 A. & E. 932.

O'Brien, for the respondent, supported the summons. Sec. 11, ss. 4, 5 of 36 Vict. cap. 28, directs that "Security \* \* shall be given in the prescribed manner, if any;" and Rule 24 prescribes the manner, which is by a document styled a recognizance, which, in the form given, is directed to be signed, thus: "Signed (signature of securities)." True that Rule 24 says the form "may be as follows," but it does not follow from this expression that the plain direction of the Rule should be ignored. The same word, "may," is used in several cases in an imperative sense. Our Election Rules are the same as the English Rules, and the Judges who framed them appear to have required the signature of the sureties in addition to their acknowledgment, which would have been sufficient for a recognizance at common law. Probably the signature was required as a greater precaution in these cases, for purposes of identification, &c., not being taken in open court, and the words of the rule should not be thrown aside as devoid of meaning. If there is any doubt as to the

validity of the document it should be set aside, so that the respondent may not be deprived of security for his costs. The petitioner is not shut out, as he can pay money into court in lieu of the security.

MR. DALTON, Clerk of Election Court. Rule 24 says that "the recognizance shall contain the name and usual place of abode of each surety, &c., and may be as follows." The form, therefore, is not material, except as to certain particulars, and a recognizance is good without the signature of those entering into it. I must therefore disallow this objection to the security.

A summons by way of appeal was thereupon obtained from the Chancellor, which was heard before the Election Court, and was argued by the same Counsel. O'Brien, for the respondent, referring in addition to the case of *Cousins v. Hely*, 34 U.C. Q.B. 74, where, under similar words in Con. Stat. U.C., cap. 29, sec. 8, "the bond and assignment may be in the form B," and the form saying, "signed &c., in presence of," it was held that a subscribing witness was necessary.

RICHARDS, C.J. We think the security is sufficient. The document required is a "recognizance," and a recognizance does not require a signature for its validity.

*Summons discharged with costs.*

#### CHANCERY CHAMBERS.

##### NOTES OF CASES.

RE HALLETTE.

*Administration order.*

[June 8, 1874.—BLAKE, V. C.]

An administrator is entitled *ex parte* to an administration order, where the liabilities of the estate exceed the assets.

CAMPBELL V. EDWARDS.

*Staying proceedings pending rehearing.*

[June 16, 1874.—THE CHANCELLOR.]

On motion to stay proceedings pending rehearing, the Court will follow the practice laid down in Con. Stat. U.C. H. 13., with reference to staying proceedings pending an appeal to the Court of Appeal.

Where, therefore, a decree had been made, directing the defendant to pay to the plaintiff a large sum of money and costs, an order was made, on the application of the defendant, who intended to rehear, staying proceedings in the meanwhile, upon the defendant's giving security for the due payment of the said money and costs, in case the decree should be wholly or in part affirmed upon the rehearing.

## CAMPBELL V. O'MALLEY.

## MUNICIPAL ELECTION CASE.

REG. EX REL. CAMPBELL V. O'MALLEY.

*Quo Warranto Summons—Proof of Relator's status.*

*Held*, That the proper proof of the right of an elector to be a relator is the production of the roll or an authenticated copy. His own statement on oath is insufficient.

[St. Thomas—April 17, 1874.]

On the hearing of this case the relator was called as a witness. He stated that he was an elector of the Township, but no other evidence of the fact was tendered, and the roll was not produced.

*McMahon*, for defendant. This evidence is not sufficient. The proper proof would have been the production of the roll. Proof of the relator's qualification was material to his case, and not having been given, the summons must be discharged.

*McDougall* for relator, *contra*.

HUGHES, Co. J.—I can see nothing in this case to take it out of the general rule applicable in all such cases. The statute requires that the election complained of by this proceeding must be questioned by some person having an interest in the election, either as a candidate or an elector. In this case the statement sets forth that the relator claims interest as an elector. Under the previously existing statute, the practice was to have the parties before the Court by written statements and answers, supported by affidavit; and the decisions cited by the relator in this case refer to that practice; but they are now inapplicable. The law and the practice relating to such matters are now so changed that the respondent does not make his answer in writing, so that he cannot be now presumed to have waived his right to object to any defect in the relator's case.

I therefore think it was the duty of the relator to make good all his principal allegations, the first of which was (in the order of importance) that he himself had an interest in the election so as to give him the right to be heard in this Court and to object to the election. There were other necessary allegations in his statement that required proof; but a written admission on the part of the respondent had been secured by the relator which covered them all, except those referring to alleged acts of bribery and corruption. I am therefore led to infer that the relator came before me expecting to prove his interest as an elector as well as the acts of alleged bribery. The cases are numerous which go to show the kind of evidence

that should have been offered to support the relator's interest—that he was an elector. For purposes of the election the voters' list would supply it, if at all, and I apprehend that that which the statute provides for on that occasion would be the best and proper proof of it here, although an examined copy, duly proved, would have answered the same purpose: *Reed v. Lamb*, Ex. R. N. S. 75. It has been held in the Court of Queen's Bench in England, in *Rees v. Parry*, 6 A. & E. 818, that an affidavit alone does not show, in a *quo warranto* proceeding, sufficient ground for the information, but the relator's interest should be shown by other and more competent proof. In *Rees v. Inhabitants of Coppull*, 2 East, 25, Lord Kenyon held that parol evidence could not be given of rates which were not produced nor excuse furnished for not producing—that the best evidence which the nature of the case would admit of should have been offered; and Grose, J., said that "it is in every day's experience to reject parol evidence of a writing which may and ought to be produced."

In the absence of any legal evidence of the contents of the voters' list or of the assessment roll, I think the relator was bound to produce it in this case, and that he could not be allowed to state whether his own name was inserted in it; or (putting it in another way) he could not be allowed to say whether or not he were an elector, when the law makes the insertion on the last revised assessment list the indisputable test of his right to vote, and *ergo* of his being legally an elector. The case of *Justice v. Elstob*, 1 F. & F. 256, decided at Nisi Prius in England, was similar in principle. There Mr. Justice Hill said that in the absence of any evidence of the contents of a rate book, a collector could not be asked to say whether a particular person's name was on the rate. In "Taylor on Evidence," 6th ed. vol. I., sec. 380, it is said: "Oral evidence cannot be substituted for any writing, the existence or contents of which are disputed, and which is material to the issue between the parties. \* \* \* The fact of rating cannot be legally proved without the production of the rate books."

I therefore think, as the relator's case failed in one of the first essentials, the summons should be discharged, and that judgment should be given for the respondent with costs.

*Summons discharged with costs.*

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REEDE AND GOODMAN V. PIPON.

[Ir. Rep.]

# IRISH REPORTS.

## COURT OF QUEEN'S BENCH.

REEDE AND GOODMAN V. PIPON.

*C. L. P. Act, 1853, ss. 31, 34—Extra territorial jurisdiction—Substitution of service—Service on defendant in person, out of the jurisdiction—Conclusiveness of decisions in the Court where made.*

The Courts of Common Law have jurisdiction to order that service of a writ of summons and plaint by serving the defendant in person, out of the jurisdiction, shall be deemed good service.

*Kelly v. Dixon*, Ir. R. 6 C. L. 25, discussed; and (dub., Fitzgerald and Barry, J.J.), followed.

[Ir. L. T. Rep., Feb. 14, 1874.]

Cause shown against making absolute a conditional order, obtained by the plaintiffs, that service of the writ of summons and plaint and order upon the defendant in Jersey be deemed good service of the writ.

The action was brought to recover £100, 15s. 6d. for work done by the plaintiffs, as attorneys for the defendant, and for money paid, and on accounts stated. The order had been obtained upon an affidavit of the plaintiffs, stating that the defendant, Thomas Le Breton Pipon, permanently resided at La Maisonette, St. Peter's, in the island of Jersey, out of the jurisdiction of the Court, and that he was possessed of property in that island; that he had no agent, place of business, or property within the jurisdiction of the Court; that the causes of action arose within the jurisdiction; that part of the services respecting which the action was brought were rendered in defending certain actions brought in Dublin against the defendant's son, while he was a minor, upon the defendant's retainer; and that other part of said services were rendered in defending another action in Dublin against defendant's son after he had come of age, and also for miscellaneous professional services, in reference to his son's affairs, rendered upon the defendant's retainer; that the defendant attended as a witness upon some of the trials; that when the costs were being taxed, the plaintiffs intimated to the defendant the fact, and received from him a communication, forwarding a banker's draft for £55, and requesting to be furnished by them with, as soon as convenient, their account for professional charges; and that the plaintiffs were advised and believed that the recovery of said costs and money would be attended with great difficulty, expense, and delay in Jersey, but that, in the event of procuring a judgment in the Court in

Ireland, it could, without difficulty and at a trifling expense, be made available against the property of the defendant in Jersey. The motion stood over from Consolidated Chamber, by direction of Morris, J., and now,

Clearly, on behalf of the defendant, showed cause. The Court has no power to order service to be had upon the defendant in person out of the jurisdiction; but, even if the Court have the power, it is one which should not be exercised, in the discretion of the Court, in this instance. It does not appear that the defendant is a British subject, or that he was ever personally in this country; and he cannot be said to be constructively within or subject to this jurisdiction, since he has no agent, place of business or property in this country—and, if a judgment were had against him here, there is nothing to show that it could be made to attach either his person or property. Unless, therefore, jurisdiction has been given by the express language of the Legislature, its exercise here would contravene the general principles upon which territorial jurisdiction depends, *Cookney v. Anderson*,\* 1 De G. J. & S. 365, 379. Morris, J., in Chamber, when directing that the motion should stand over, intimated that his impression had heretofore been that the Irish Courts had no power to effect service of process upon a defendant in person out of the jurisdiction; and in *Knox v. Lord Rosehill*, not reported, Dowse, B., questioned whether service could in such case be ordered to be made merely by a registered letter.†

[O'BRIEN, J.—We decided the contrary in *Kelly v. Dixon*, Ir. R. 6 C. L. 25; and as I have been informed by an officer of the Common Pleas, that Court has followed our decision. BARRY, J.—It may be said that "substitution of service" is a different thing from an order directing personal service. I may mention that, in granting the conditional order in this case, I had regard to section 31 of the C. L. P. Act, 1853. FITZGERALD, J.—The words "or other sufficient grounds," in section 34, seem to mean for substitution of service.]

The Court of Exchequer refuses to grant orders on the authority of *Kelly v. Dixon*.

\* See as to this decision, *Steele v. Stewart*, 33 L. J. Ch. 190; *Foley v. Maillardet*, 9 L. T. N. S. 643; *Osborne v. Osborne*, 2 Ir. L. T. 58; *Newland v. Arthur*, ib., 316; *Friszelle v. Cotton*, ib. 4 106. In Bankruptcy, see *Re O'Loughlin*, L. R. 6 Ch. Ap. 406; *Re Williams*, 28 L. T. N. S. 488; *Re Vaughan*, 3 N. R. 293.—Ed. Ir. L. T. Rep.

† See reply of Morris, J., to the Eng. and Ir. L. and Ch. Com. (1863), 7 Ir. L. T. 494. See also *Barry v. M'Neight*, 8 Ir. L. T. 64 bis; and observations in *Knox v. Lord Rosehill*, 7 Ir. L. T. 504.—Ed. Ir. L. T. Rep.

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In that case *Dizon v. Capes*, 11 Ir. C. L. 845, was not cited, where it was held by the Court of Exchequer that the words in section 84, "or on other good and sufficient grounds," mean grounds of the same character as those enumerated.\* The preamble of the Act shows that it was passed merely to simplify and amend procedure, and not to enlarge jurisdiction.† It virtually enacts the law previously existing, as declared by judicial decision regarding substitution of service. The terms of 43 Geo. 3, c. 53, s. 8, were most extensive; and yet, it was a matter of controversy whether that provision applied to a person out of the jurisdiction at all—and it was never applied unless the defendant was, at least, constructively within the jurisdiction, as by having an agent here, *Phelan v. Johnson*, 7 Ir. L. R. 527.

[FITZGERALD, J.—Your argument goes to this, that, being made without jurisdiction, the order is a nullity; and if so, that there would be no authority to enforce it, or to affect the defendant. BARRY, J.—Do you admit that the defendant has sufficient notice of the proceedings within the principles of natural justice, according to *Sheehy v. The Professional Life Assurance Co.*, 13 C. B. 787?]

That is conceded, and, therefore, there would not be a defence in that regard to an action on the judgment in Jersey. But the notice has been effected by an excess of jurisdiction, to which we are now entitled to except, and which is not cured by our appearing for that purpose, *Cookney v. Anderson*, *supra*.

[WHITESIDE, C. J., referred to *Reilly v. White*, 11 Ir. C. L. R. 142].

A defendant may be present by his agent, as well as act by an agent. But, there is no more power to serve him in person out of the jurisdiction than to substitute service on him by serving an agent out of the jurisdiction. Sections 31-33 relate to service within the jurisdiction. Section 34 relates to substitution—1st. Where the defendant is within the jurisdiction, and avoiding service; and 2nd. Where a defendant is without the jurisdiction, and has an agent within it. The words "or on other good and sufficient grounds" may receive application by dealing thereunder with defendants who are within the jurisdiction, but cannot be

served under the previous section; thus by serving a prisoner or lunatic by substituting service on the governor of the gaol or keeper of the asylum.‡

[WHITESIDE, C. J.—Must a person who has "removed to avoid service" have an agent here?]

It may be that a person cannot, in the eye of the law, be said to change his domicile within the jurisdiction by absconding, with the intention of defeating process of law;§ and if his place of abode is still to be considered as within the jurisdiction, it is unnecessary that he should have an agent here. At all events, it is unnecessary to press this argument to the extent of saying that a person so removing could not be served in person; although probably he should be served by some mode other than by service in person. In this case there is no reason why the defendant should be deprived of the right of having a suit against him disposed of in his own forum; and the argument on the other side must go to the extent of contending that a defendant may be served by sending a telegram to San Francisco.

[BARRY, J.—The English C. L. P. Act made provision for serving a foreigner in person. The Irish Act is founded on it to a great extent; and may it not be argued that it was intended in the one section of our Act to comprise everything to which the English provisions on the subject extended?]

The powers given by the English Act were carefully defined and limited, not only with a view to secure private rights, but to prevent the sovereignty of the State coming into conflict with others, C. L. P. Act, (Eng.), 1852, s. 18; Day C. L. P. A. 45. It could not have been intended that the provisions contained in three or four special enactments in the English Act were to be spelled out from as many words in the Irish. In the Irish Act no inquiry precedent is enforced as to whether the defendant is a British subject, with a view to prevent a violation of sovereignty; but, if it were in-

\* By inadvertence the reference of Hughes, B., to section 31 was not cited.—Ed. Ir. L. T. Rep.

† Compare title of C. L. P. A. Act, 1856. And as to construction of the Acts see *Siehel v. Borch*, 2 H. & C. 257; *Jackson v. Spittal*, L. R. 5, C. P. 550; *Carlisle v. Whalley*, L. R. 2, H. L. 416.—Ed. Ir. L. T. Rep.

‡ Compare on the construction of similar words in 13 & 14 Vic. 18, 9, *Sheehy v. Professional Life Assurance Co.*, 3 C. B. N. S. 507. As to substitution of service on lunatics, see *Wilmot v. Warrington*, 8 Ir. L. R. 224; *Vance v. O'Connor*, 11 Ir. 80; *Sweeney v. Shee*, 2 Ir. L. T. 574; *Kimberley v. Alleyne*, 2 H. & C. 223, 11 W. R. 757; *Dennison v. Harding*, 15 W. R. 345, 2 W. N. 17; and vide *Ridgeway v. Cannon*, 23 L. T. 145, 2 W. R. 473; *Holmes v. Sweeney*, 34 L. J. C. P. 24; *Williamson v. Mapps*, 28 L. J. Ex. 57 W. R. 50. As to service on defendant in prison, see *Maguire v. Gardiner*, 4 Ir. L. R. 210; *Cosby v. Robinson*, 8 Ir. Jur. N. S. 37; *Dennis v. La Capitaine*, 21 L. J. Ex. 219.—Ed. Ir. L. T. Rep.

§ See *Re Williams*, 28 L. T. N. S. 498.—Ed. Ir. L. T. Rep.

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tended to confer this jurisdiction, the first care of the Legislature would have been, by enforcing such inquiries, to prevent the civil power of the State from coming into conflict with that of other States. And it is to be observed that the English Act contains provisions of a peculiar character as to the mode of procedure to be subsequently adopted, so that, instead of enabling final judgment to be marked by default in the ordinary way, special safeguards are ordained compensatory to a defendant for the deprivation of his right of being sued in his own forum. Here, if the defendant is to be sued in this country, the plaintiffs can gain nothing thereby; they must seek a remedy by another distinct action in Jersey on the Irish judgment; and the defendant is thus harassed by a double procedure, while one tribunal would have given the plaintiffs redress.

*Holmes, contra.*—Except from his name and address, there is nothing to show that the defendant is a foreigner; and he does not suggest even that he has a case on the merits.

[WHITESIDE, C. J.—His letters show that he can write English in the purest vernacular. BARRY, J.—And I may add—for I know something about it—that he has very wisely abstained from going into the merits.]

It has been settled by *Kelly v. Dixon* that the jurisdiction here in question exists, and will be exercised in a fitting case. This case was not argued or fully opened before Morris, J., and he expressed nothing approaching to a final opinion upon it. The Court of Common Pleas have made similar orders to that made in *Kelly v. Dixon*, as I myself can vouch. The question then is whether this Court will follow its own practice, or permit the same question to be re-argued which was settled in *Kelly v. Dixon*.\*

He was then stopped by the Court.

WHITESIDE, C. J.—I think that the conditional order in this case should be made absolute. We have before us the case of *Kelly* and *Dixon*, decided in this Court by the full Court—decided consistently with justice, and in furtherance of a beneficial purpose. It does not appear that any case conflicts with the decision there made. The Court of Common Pleas appear to have followed it, and we cannot now review or reconsider our decision. It is as if counsel came in the day after that decision and asked us to review the very matter we had decided.

It is of importance that a rule, once made (even apart from whatever may be its intrinsic value), should be steadily and consistently adhered to; and though we respect the arguments urged on behalf of the defendant by his counsel, yet, looking to the words of the Act of Parliament, and the decision in *Kelly v. Dixon*, which has been adopted by a Court of co-ordinate jurisdiction and not impugned by any, we cannot proceed further with this motion. I may, however, add that I have been much impressed by what is said by the Chief Baron, in *Reilly v. White (ante)*. The order must be made absolute.

FITZGERALD, J.—I shall merely add that, although I was one of the members of the Court by whom the case of *Kelly v. Dixon* was decided, and was myself a party to that decision, I would personally desire a reconsideration of the case, as I entertain considerable doubts relative to its correctness; but we have decided in that case a point of practice, and when we are now asked not to follow it, it does seem as if the day afterwards another counsel came in and asked us to re-hear the case—and that although followed by another Court. It would be a different thing if that case had been quarreled with by another Court; and I should then think that it would be desirable to reconsider it fully with a view to uniformity, and to overrule it if it has been incorrectly decided. If the abstract proposition here contended for is well founded, that the order is an excess of jurisdiction, the defendant may have it in his power to prevent the consequences of it.

BARRY, J.—I entirely concur in opinion with my Lord Chief Justice, that it would be exceedingly inconvenient to re-agitate the question decided, after solemn arguments, in the case of *Kelly v. Dixon*, since followed by the Common Pleas. I was not a member of the Court when it was decided; the decision came upon me with surprise. I am not prepared to say whether I would abide by it. But I think, however, that it is not inconsistent with the principles of natural justice.

O'BRIEN, J.—I concur in the opinion pronounced by the other members of the Court. I cannot see the propriety of re-arguing the case of *Kelly v. Dixon*, where there has not been any appeal from that decision, and it has not been dissented from by any Court of co-ordinate jurisdiction. The question may come before us

† "Perhaps it is of less importance how the law is determined than that it should be determinate and certain; and such determinations should be adhered to, for then every man may know how the law is;" per Ashurst, J., 7 T. R. 419. "Uniformity, perhaps, is of more importance than extreme accuracy of construction;" per Pennington, B., 6 L. R. N. S. 313.—Ed. Ir. L. T. Rep.

\* See per Bushe, C. J., *Sterns v. Guthrie* 1 F. & S. M. 46, per Lord Eldon, *Wellesley v. Duke of Beaufort*, 2 Russ. 19; and vide per Dallas, C. J. *Smith v. Jersey*, 2 B. R. & B. 581.—Ed. Ir. L. T. Rep.



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again after it has been considered by another Court. I remember a case from the North of Ireland, in which, in like manner, a question arose and the Court made a decision. The same question was brought before us in another case, but as we heard that the principle involved in that case was to be argued in a case that was about being discussed in the Common Pleas, we postponed pronouncing our decision in the case to which I have referred, till we had ascertained how the Common Pleas had determined. If the Common Pleas dissented, we would have reconsidered our views; but as the decision to which they came was in conformity with our judgment, we would not permit the question to be re-agitated. But if *Kelly v Dixon* should be dissented from—I do not refer to mere loose expressions of disapprobation—we shall willingly reconsider it.

*Order made absolute.*

## UNITED STATES REPORTS.

### SUPREME COURT OF IOWA.

GEORGE HOOKER, BY HIS NEXT FRIEND, ETC., v.  
JOHN MILLER.

#### *Defence of Property by Spring-Guns.*

1. *Spring-Guns—Trespassers.*—Where the owner of a vineyard sets a spring-gun, so arranged with cords or wires, that a trespasser coming into the vineyard will by coming in contact with such cords or wires discharge the gun and receive injury therefrom, and gives no notice of having such spring-gun in his vineyard, and a trespasser entering the vineyard, comes in contact with such cords or wires, whereby the gun is discharged, and he receives injury, the proprietor is liable in damage to the trespasser.

2. —. *In pari delicto.* The rule *in pari delicto* does not apply in such cases.

3. —. *Notice.*—Whether notice that such a contrivance had been laid for the protection of the property, would justify the resort to such means, the court do not determine.

[Central Law Jour., Jan. 29, 1874.]

Action to recover damages resulting from injuries sustained by plaintiff from a gun-shot wound received by him by means of a spring-gun placed by defendant on his own premises. There was a verdict and judgment for plaintiff: defendant appeals. The facts of the case appear in the opinion.

*S. P. Vanatta, I. M. Preston & Son*, for appellant; *Thompson Davis and Nichols*, for appellee.

BECK, CH. J.—The defendant was the owner of a vineyard, and had lost grapes by trespassers entering his enclosure and carrying them away. To protect his fruit from such persons, he planted

a spring-gun, so arranged that it would be discharged, in the direction of one entering his premises, by means of wires or cords, which the trespasser would be likely to come in contact with and disturb. He gave no notice whatever that he had so arranged the gun, or of his intention so to do. The gun being thus placed, and charged with powder and shot, the plaintiff, in the night-time went into the vineyard, without defendant's permission, and received a severe wound from discharging the gun, through the arrangements provided for that purpose. The plaintiff testifies, that his object in entering the premises was, to ask permission of the defendant to take some grapes. But it may be conceded for the purpose of this case, that he entered with the intention of wrongfully taking the fruit without the plaintiff's permission. The court instructed the jury, in effect, that if defendant had set the gun in such a way as to destroy life, or do great bodily harm, of which the plaintiff had no knowledge, and the plaintiff in entering the premises for the purpose of taking grapes, without defendant's permission, was wounded by means of the gun, he is entitled to recover; that the act of plaintiff in that case was but a misdemeanor, and would not justify its resistance by means that would take life, or do great bodily harm; that defendant had no right to use a spring-gun, for his protection against a mere trespasser, without notice to him, and the defendant's liability, on account of the wound caused by the spring-gun, is the same as though he had discharged it with his own hands.

The giving of these instructions, and the refusal of others presenting a conflicting doctrine, constitutes the foundation of the errors assigned by defendant.

I. The act of the plaintiff entering defendant's vineyard in the night-time, conceding that it was for the purpose of taking grapes without permission, is a misdemeanor. Acts 12 Gen'l Ass. Ch. 74; § 2, Code § 3898. But the defendant had no right to prevent or resist the trespass of the plaintiff by using means dangerous to life or by inflicting great bodily injury. In doing so he violated the law, and became liable for injuries sustained by plaintiff, under the doctrine that all injuries inflicted by one, while acting in violation of the law, will support an action in favor of the injured party against the perpetrator. This court has held that a mere trespass against property other than a dwelling, is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defence; and that, if death results in such a case it will be murder, though the killing be

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actually necessary to prevent the trespass. The *State v. Vance*, 17 Iowa, 138. The rule is based upon the consideration that an act of violence done to prevent trespass which causes death, is beyond the provocation, and the perpetrator is guilty of murder. If the intention was not to take life, or the act was done in the heat of passion, the offence would be extenuated, and become no more than manslaughter.

Under the law, at the time of the killing, for which defendant was convicted, in the case just cited, a trespass of the character of the one committed by the person killed, which was not different from the act of the plaintiff in this case pleaded by the defendant as a justification, was not punishable as a misdemeanor. But this fact cannot defeat the application of the rule of the case now. The rule is based, not on the light in which the law regards the act and the punishment provided for it. The criminality of the act, or the turpitude of the trespasser is not the foundation of the rule. But it is based upon the limitation which the law imposes upon the right of the owner of property in rendering it protection. He cannot prevent a trespass by using means dangerous to life. Now, if the act of the trespasser is punishable as a misdemeanor, that fact does not demand greater violence, or more dangerous means, to secure protection, than if the same act were regarded as a mere trespass and not a crime. In other words, it requires no more violence to protect property from a trespasser when there is a statute punishing him criminally, than it would in the absence of such an enactment.

The act of defendant, we conclude upon the authority cited and upon principle, in preparing the means whereby the plaintiff's life was endangered, and from which he sustained great bodily injury, was unlawful. It follows in the application of familiar doctrines, which do not demand the support of authority to secure their recognition that he is liable for the injury inflicted upon plaintiff.

It has been held in England that a trespasser, having notice that spring-guns are laid upon the premises, cannot recover in an action against the owner thereof, for injuries sustained thereby. *Holt v. Wilkes*, 3 Barneswall & Alderson, 304. And that when a trespasser, without such notice, is injured in the same way, he may recover in such an action. *Bird v. Holbrook*, 4 Bingham, 628. So the owner of a vicious dog is liable for injuries sustained by a trespasser, from being bitten by such dog. *Shirley v. Bartley*, 4 Sneed, 58. In New York the same doctrine, with modifications on the side of humanity, has been recog-

nized. It has been there held that the nature and value of the property ought to be such as to justify the use of means for its protection which are dangerous to life, and that the trespasser must have full notice of the mischief, in order to exempt the owner from liability for injuries inflicted. *Loomis v. Terry*, 17 Wend. 496.

Whether notice to the trespasser of the dangerous contrivances laid for the protection of property would relieve the owner of liability for injuries caused thereby, we do not determine, as the facts before us do not involve that question, no such defence having been made in this case. The authorities that have come to our notice seem to recognise such a rule.

It has been often held that it is no justification for killing animals, that they were trespassing upon another's premises, or doing injury to his property. *Ford v. Taylor*, 4 Texas, 492; *Tyner v. Cory*, 5 Ind. 216; *Wright v. Ramscol*, 1 Saund, 83.

This rule is doubtless supported upon the consideration that the protection of one's property will not justify the resort to means that are destructive to the property of another, when not demanded by necessity, or the nature of the rights and property concerned. Certainly, humanity requires that a like rule be extended to the person of a trespasser, and that he be not exposed to bodily injury or death, on the mere ground that he is, at the time, acting in violation of law.

II. The defendant insists that under the rule, *in pari delicto*, or of contributory negligence, the plaintiff cannot recover. If the case be regarded as one of simple negligence on the part of defendant, plaintiff could not be held to the exercise of care, and, in its absence, of contributing to the injury, by his own negligence without having notice of the dangers to which he would be exposed. He could not be regarded as wanting in care, by failing to use means for his protection, from dangers unknown to him, or in exposing himself thereto. The rule *in pari delicto*, affords no protection in a civil action, to a party who has control of dangerous implements and negligently uses them or places them in a situation unsafe to others, whereby another person, without knowledge thereof, is injured, although, at the time, in the commission of a trespass.

This qualification of the rule is demanded on the ground that proper regard for life and the person of others requires care, on the part of persons using deadly weapons and dangerous implements, that injury to others may not be inflicted, and that mere trespasses and other incon-

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siderable violations of the law, are not to be visited by barbarous punishments, or prevented by inhuman infliction of bodily injuries. The instruction of the court directing the jury that the doctrine of contributory negligence was not applicable to the case, is therefore correct.

It is our opinion that the jury were properly instructed, and that the instructions asked by defendant were correctly refused.

(Note by Editor of *Central Law Journal*.)

1. *Defence of Property by Spring-guns—The English Rule.*—The question whether the owner of property may lawfully resort to the use of spring-guns and engines of like character, for protecting it in his absence, against trespassing men or animals, is somewhat novel in this country. The question first arose in England in 1817, in the Common Pleas, in *Deane v. Clayton*, 7 Taunt. 489. The defendant, who was the owner of a wood, had fixed to the trees what were commonly known as dog-spears, being iron spears, fastened to the trees past which the hares were accustomed to run, placed at such a height that while the hares would pass under them, dogs and foxes pursuing the hares would run against them, and be killed. The defendant had posted notice that such spears were set in the wood. The plaintiff being engaged in hunting in the wood with a valuable dog, the dog made his escape from him, and, pursuing a hare, ran against one of the spears and was killed. The judges were equally divided as to whether the plaintiff ought to recover damages; and so no result was reached. Three years later, in the leading case of *Hott v. Wilkes*, 3 Barn. & Ald., 304, (cited in the principal case), the question came before the King's Bench upon the following state of facts: The defendant had placed spring-guns in a wood owned by him, and had posted notices that such guns were so set. Nevertheless, the plaintiff entering the wood to gather nuts, trod upon a wire connecting with one of them, by which it was discharged, and he severely wounded. The question received an exhaustive discussion, and all the judges agreed that the plaintiff could not recover. In both of these cases the plaintiff had notice of the existence of the engines which caused the injury: and in both cases the judges were agreed that, had there been no notice, the plaintiff would be entitled to recover, and that without notice it would not be lawful to expose even a trespasser to mortal injury. And agreeably to this view, in a subsequent case—*Bird v. Holbrook*, 4 Bing. 628, (cited in the principal case)—where the defendant for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, by which the plaintiff, who had climbed over the wall in pursuit of a stray fowl, was shot, it was held that the defendant was liable in damages, on the ground that there had been no notice; but the correctness of this ruling is doubted in *Jordin v. Crump*, 8 Mees. & Wells, 789. So in *Jay v. Whitefield*, an unreported case, cited in 3 Barn. & Ald. 308, and in 4 Bing. 644, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages; but it does not appear whether or not notice had been given in this case.

The reasoning upon which *Hott v. Wilkes* proceeded was, that since the plaintiff had notice that there were spring-guns set in the wood, the act of discharging the one which caused the injury to him, was his own act,

and not the act of the defendant. The fallacy of this reasoning is conclusively shown by *Sheridan, J.*, in *Johnson v. Patterson*, 14 Conn. 1, where the reasoning of Justice HOLBORN is said to involve the proposition that a man is not responsible for not guarding against the intended consequences of his own innocent act; and, if he does not, that shall be considered as his own act, which is the act of another. The reasoning of the judge appears to have been little better than mere sophistry, intended to clothe with some color of legal reason a barbarous rule of law, which really had its foundation, like the English game laws, in feudal and aristocratic policy—a policy which has no existence in this country. And, it is to be said to the credit of the English legislature, that very soon after the determination of this case, the rule declared by it was abolished by statute, 7 and 8 Geo. 4, ch. 18; and this statute has been substantially re-enacted in the 24th and 25th Vict., ch. 100, § 31, by which it is declared, in substance, that whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and, being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years, 27 [and 28 Vict. ch. 47.] or to be imprisoned for any term not exceeding two years, without hard labor. And by the subsequent provisions, whosoever shall knowingly and wilfully permit such traps to be set, is deemed to have set them himself; provided this act shall not apply to traps set to destroy vermin, nor to engines set at night for the protection of dwelling-houses.

But, notwithstanding this statute, the English judges seemed disposed to favor the practices prohibited by it as much as possible. Thus in *Weston v. Dargbina*, 2 Com. Bench, N. S. 412, the plaintiff entered the defendant's garden at night without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down and slightly injuring his face and eyes. It was held—1. That the defendant was not liable for this injury at common law. 2. That in the absence of evidence that it was caused by a spring-gun or other engine calculated to inflict grievous bodily harm, he was not liable under the 7 and 8 Geo. 4, ch. 18 § 1.

2. *Dog-Spears—The English Rule.*—The question left unsettled in *Deane v. Clayton*, *supra*, as to the right to protect game in parks by means of dog-spears, was finally resolved in favor of the right, in *Jordin v. Crump*, 8 Mees. & Wells, 782, where the rule was laid down that a person passing, with his dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood, for the death or injury of his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the 7 and 8 Geo. 4, ch. 18.

In a case earlier than any of the above, it was held that if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept on his neighbor's premises, must probably be attracted by their instinct into the traps; and if, in consequence of such act, his neighbor's dogs are so attracted, and thereby

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injured, he is liable in damages. *Townsend v. Watson*, 9 East, 277. But in this case it was proved to have been his intention to kill dogs by this means, as well as other animals; and several dogs having been killed in such traps, and he having allowed his game-keeper a reward of one shilling for every dog so killed.

3. *Spring-guns*.—*The American Doctrine*.—The question as to the lawfulness of the use of spring-guns in the defence of property first arose in the United States, in *Gray v. Coombs*, 7 J. J. Marshall, 478, in the Court of Appeals of Kentucky, in 1832; and it was there ruled that where a person has valuable property in a strong warehouse, well secured by locks and doors, he may, as an additional security at night, erect a spring-gun which can only be made to explode by entering the house; and if a slave in endeavoring to break into the warehouse is killed by such spring-gun, the owner of the warehouse will not be liable to the master of the slave for his value.

The question next received an exhaustive discussion in *Johnson v. Patterson*, 14 Conn. 1, decided in the Supreme Court of Errors of Connecticut in 1840; although it was not directly involved in the case. The action was for damages for poisoning the plaintiff's fowls. The defendant, to prevent the plaintiff's fowls from trespassing on his lands, as they had before done, mixed Indian meal with arsenic, and spread it upon his land, having given the plaintiff previous notice that he should do so; and such fowls coming afterwards upon the defendant's land ate the poisoned meal, in consequence of which some of them died; it was held: 1. that the previous notice, in contradistinction to notice after the fact, was sufficient; 2. that notwithstanding such notice, the defendant was not justified in the use of deadly means, and consequently was liable in damages. And, the right of an owner to defend his property in his absence, by means of engines or poisons placed so as to kill or injure trespassing men or animals, was discussed at length upon principle and in view of the English authorities, and it was held, that no such right exists in Connecticut. But the doctrine of this case was limited to cases of trespasses merely. What may be done to prevent burglary or felony, was admitted to be governed by other rules.

The question appears next to have arisen in *State v. Moore*, 31 Conn. 479, determined in the Supreme Court of Errors of Connecticut, in 1863. The defendant was indicted for a nuisance in placing spring-guns in his blacksmith shop so as to endanger passers-by on the highway. The jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars, that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside and double-boarded on the outside, but that it was possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and that the travelling public were annoyed and apprehensive of harm from the guns. It was held, that it did not appear that there was such real and substantial danger to the public as to warrant a conviction.

Concerning the right of resorting to spring-guns for the purpose of protecting property, the court reason, that the mere act of setting spring-guns on one's own premises for their protection, is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected

by it to any danger; that what a man may not do directly, he may not do indirectly: that a man may not, therefore, place instruments of destruction for the protection of his property, where he would not be authorized to take life with his own hand for its protection; that the right to take life in defence of property, as well as of person and habitation, is a natural right, but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one; that in the absence of any statutory provision-making it burglary to break and enter a shop in the night-time, with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention of such a crime; but that the habits of the people and other circumstances have so greatly changed since the ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property; that breaking and entering a shop in the night-season with intent to steal, is, by the law of Connecticut, burglary; and that the placing of spring-guns in such a shop for its defence, would be justified, if the burglar should be killed by them; that the guns would, however, constitute a nuisance if they cause actual danger to passers-by in the street; but that the danger to the public must be of a real and substantial nature.

4. *Limit of the Right to defend one's Goods*.—If we adopt the conclusion of the Connecticut case last above quoted, that what a man may not do directly, he may not do indirectly, the question involved in the principal case will be found to have been settled by a great weight of authority. That a person is not obliged to surrender the possession of his goods, his lands or other property to a wrong-doer without resistance, does not admit of question. *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 1 Hill, 336; S. C., 4 Hill, 487; *Commonwealth v. Kennard*, 8 Pick. 133, 137; *Commonwealth v. Power*, 7 Metcalf, (Mass.) 596; *People v. Honsell*, 10 Cal. 87; *Harrington v. People*, 5 Barb. 611, 612; *McAuley v. State*, 3 G. Greene, 435; 1 Bish. Crim. Law, § 861, 5th ed. He may by the doctrine of these, and all the cases where the rule is stated, use, within a certain prescribed limit, as much force as is necessary to preserve his possession—taking care the degree of force used does not exceed what is necessary, or what reasonably appears to be necessary, for the purpose of defence and prevention. The limit here spoken of, is the limit at which it becomes necessary to take or endanger life, in order to protect one's possession. And here, the criminal law, which seeks certainty in its rules as far as possible, divides offences against property into two general classes, namely, felonies and trespasses, for the purpose of determining whether a killing in prevention of such offences shall be deemed justifiable or culpable.

And the first rule which may be stated is, that a killing which is necessary, or which reasonably appears to be necessary, to prevent a forcible and atrocious felony against property, is justifiable homicide. *Pond v. People*, 8 Mich., 150; *People v. Payne*, 8 Cal., 341; *State v. Roane*, 2 Devereaux, 68; *Gray v. Coombs*, 7 J. J. Marshall, 478; *State v. Moore*, 31 Conn., 479; *Johnson v. Patterson*, 14 Conn., 1. This rule, the common law writes its limit to cases of secret felonies or felonies not accompanied with force. 1 Hale P. C., 493; 1 East P. C., 273; *Foster*, 274. Though we do not find this distinction adjudged in any modern case which we have seen, yet it has been quoted with approbation in several. *Pond's*

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case, *supra*; Moore's case, *supra*. Mr. Bishop, however, is of opinion that upon principle there can be found no such distinction in the law itself; but why he is of this opinion, he does not satisfactorily tell us. 1 Blash. Crim. Law, § 853, 5th ed. It is pretty clear that the right to kill in defence of property does not extend to cases of larceny, which is a crime of a secret character; although the cases which illustrate this exception are generally cases of theft of articles of small value. Thus, in *Reg. v. Murphy*, 2 Craw & Dix C. C., 20, the prisoner was indicted under the statute for maliciously shooting with intent to do grievous bodily harm, etc. It appeared that on the day in question, the prisoner, who was the game-keeper and wood ranger of Lord Dunsany, and armed with a fowling piece, detected the prosecutor in the act of carrying away from his employer's lands a bundle of sticks, consisting of branches severed from the growing timber by a recent storm; that the prisoner hailed him, when he dropped the sticks and ran; upon which the prisoner called out, "If you don't stop, I'll fire," but the prosecutor still going on, the prisoner fired, wounding him in the head, back and arms. DOWNEY, Ch. J., said: "There is no doubt that the prosecutor, in carrying away the branches previously discovered from the trees, was committing a felony, and the prisoner was clearly entitled to arrest him; but in discharging his gun at the prosecutor, and perilling his life, the prisoner has very much exceeded his lawful powers, and I cannot allow it to go abroad, that it is lawful to fire upon a person committing trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." And see to the same effect, *McClelland v. Kay*, 14 B. Mon. 106; *Gardiner v. Thibodeau*, 14 La. An., 733; *State v. Vance*, 17 Iowa, 144; *Priester v. Augley*, 5 Rich. (Law), 44. It may be observed, however, that the right extends to statutory felonies, as well as to felonies at common law. *Gray v. Coombs*, *supra*; *Pond's case*, *supra*; Moore's case, *supra*. And it would seem that the fact that a common law felony has been reduced by statute to a misdemeanor, does not diminish the right of defence applicable to such cases. *Gray v. Coombs*, *supra*; *Drennan v. People*, 10 Mich., 169. These cases are in accord upon this point with what is said by the learned Chief Justice in the principal case, where he says that the rule which forbids the resorting to such dangerous means for the prevention of trespasses does not depend upon the light in which the law regards the act and the punishment provided for it, but upon the limitation which the law puts upon the right of the owner of property in rendering it protection. Language of similar import was used by NICHOLAS, J., in *Gray vs Coombs*, *supra*, where he said that "a name can neither add to, nor detract from, the moral qualities of a crime; and in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means to be resorted to for its prevention." 7 J. J. Marsh, 483.

But the ordinary rule is, that a killing to prevent a mere trespass upon property, or any asportation of or injury to it, which does not amount to a felony, is a felonious homicide; or, viewed in the light of a civil action, unlawful. *Harrison's case*, 24 Ala., 67; *Drew's case*, 4 Mass., 391; *United States v. Williams*, 2 Cranch, C. C., 439; *Priester v. Augley*, 5 Rich. (Law), 44; *State v. Morgan*, 3 Ired., 186; *State v. McDonald*, 4 Jones; (Law), 22; *State v. Brandon*, 3 Jones (Law), 467; *State v. Vance*, 17 Iowa, 144; *Gardiner v. Thibodeau*, 14 La.

An. 733; *McClelland v. Kay*, 14 B. Mon. 106. As where a person kills an officer who comes unlawfully to distrain his goods. *United States v. Williams*, *supra*. Or where a person kills a slave who is stealing sugar-cane. *Priester v. Augley*, *supra*. Or stealing chickens, *McClelland v. Kay*, *supra*; *Gardiner v. Thibodeau*, *supra*. Or where a person kills another who lets down a dividing fence, and hauls off manure as to which there is a disputed claim. *State v. McDonald*, *supra*. Or kills one who is taking corn from a bin, the right to which is in dispute. *State v. Brandon*, *supra*. Or where a person fires among a party of boys, who are stealing his melons, and kills one of them. *State v. Vance*, *supra*. Or shoots and wounds a person who is carrying off branches severed from his master's trees. *Reg. v. Murphy*, 2 Crawf. and Dix, C. C., 30.

It is seen, therefore, that the rule that it is unlawful to set engines dangerous to life, for the defence of property against mere trespassers, is not only correct upon principle, as enforced by the reasoning of the principle case, but is sustained by a great array of authority; although it is possible that such means of defence are permissible to secure valuable property kept in warehouses and shops against nocturnal depredators.

## DIGEST.

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FOR NOVEMBER AND DECEMBER, 1873,  
AND JANUARY, 1874.

From the American Law Review.

(Continued from page 205.)

## LEGACY.

1. A testatrix had a power of appointment by will over a fund held in trust for her for life. She gave "£100 of such trust funds to my nephew P." and several other legacies in the same terms. *Held*, that said legacies were specific, and bore interest from the date of the death of the testatrix.—*Davies v. Fowler*, L. R. 16 Eq. 308.

2. A testatrix bequeathed to certain parties "all the money of which I die possessed." At the time of her death she held a sum in cash in her house, and she was entitled to a legacy which the executors had not paid or acknowledged as at her disposal, to the apportioned part of an annuity from the last stated day of payment, and to interest on a balance at the banker's accrued since the last time she was credited with it. *Held*, that the cash only passed by the bequest.—*Byrom v. Brandreth*, L. R. 16 Eq. 475.

3. A testatrix gave a legacy to "my niece L., second daughter of J. H. W." She then gave a further legacy "to each of my nieces, the said L. W., &c., and gave her residuary estate "in trust for the said L. W." and others. The testatrix had another niece, L. F. T. W. *Held*, that evidence was not admissible to show that the testatrix intended her niece L. F. T. W. to take in the residuary bequest.—*Webber v. Corbett*, L. R. 16 Eq. 551.

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4. A testator, after giving certain pecuniary legacies, gave all his messuages, farms, and lands at N., his stock, crops, and implements of husbandry, moneys, securities for money, and all the residue of his estate and effects, real and personal, to his wife, until his youngest child should attain twenty-one. *Held*, that said pecuniary legacies were not charged upon the testator's real estate.—*Castle v. Gillett*, L. R. 16 Eq. 580.

5. A testator gave his interest in leasehold estates to trustees, to pay half the income to his son H. for life, or until his bankruptcy or insolvency, and after H.'s decease, bankruptcy, or insolvency, which should first happen, to pay said income to all or any the children of H., in such manner as H. should appoint, and in default of appointment, to pay the same to all the children of H. There was a similar provision in favor of the testator's son F. The will contained a proviso that if, at the death of the testator's wife, either H. or F. should become entitled to the D. estate, then the son so entitled should receive no portion of said rents, but that the other son should receive the whole rents. H. filed a declaration in insolvency in Australia in 1863, and afterward received his discharge. He had four children born before said insolvency and one afterward. The testator's widow died in 1866, and F. became entitled to the D. estate. *Held*, that upon the death of the testator's wife new trusts arose of the whole of said leaseholds, identical with the trusts of H.'s moiety, and that said rents were payable to H.'s five children, subject to his power of appointment, as the gift over on the insolvency of H. took effect upon his insolvency in Australia.—*In re Aylwin's Trusts*, L. R. 16 Eq. 585.

6. A testator sent a duplicate of his will to a legatee, leaving the original with his solicitor. Subsequently he executed upon the same day two codicils in identical terms, one of which he retained, and the other he sent to said legatee. *Held*, that the legacies in said codicils were not cumulative, and that the legatee was entitled to but one legacy under them.—*Whyte v. Whyte*, L. R. 17 Eq. 50.

7. A testator gave £1000 to the children of his cousin R., to be divided equally between them. The will contained the proviso that in case any legatee should die in the testator's lifetime leaving children, such legacy should not lapse, but be paid to the children of such deceased legatee. One of R.'s children had died before the date of the will, leaving children. *Held*, that the children of the deceased child of R. did not take under the will.—*Hunter v. Cheshire*, L. R. 8 Ch. 751.

8. A married woman having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, whom she survived. *Held*, that the will passed the separate estate, but did not execute the power of appointment, nor pass property acquired

by the wife after the death of her husband, whose death operated as a revocation of his assent to the will of his wife.—*Noble v. Willcock*, L. R. 8 Ch. 778; s. c. 2 P. & D. 276.

9. A testator gave the residue of his estate to his nephews and nieces, and the issue of any of his nephews and nieces dead before him. The testator had not at the date of his will any brother, sister, nephew, or niece of his own, but there were nephews and nieces of his deceased wife. *Held*, that the nephews and nieces of the testator's wife took under the will, and that evidence that the testator and such nephews and nieces were on unfriendly terms was inadmissible.—*Sherratt v. Mountford*, L. R. 8 Ch. 928.

10. A testator gave a fund upon trust for his wife for life, then to his daughter for life, and after his daughter's death to her children, who being sons should attain twenty-one, or being daughters should attain that age or marry; and if no such children, to certain persons named. By a codicil the testator added the proviso, that in case his daughter should be living at the expiration of five years from the death of the testator's wife, and should not have had any children, said fund should be at once divided among said ulterior legatees. At the expiration of five years and six months from the death of the testator's wife the daughter had her first child. *Held*, that the ulterior bequest did not take effect, as there was a child *in ventre sa mère* at the expiration of said five years.—*Pearce v. Carrington*, L. R. 8 Ch. 969.

11. A testator gave a fund to his widow for life, and after her decease one moiety in trust for each of his two daughters for life, remainder to their respective children. If either daughter died childless, her moiety to be held upon the trusts of the other moiety. If both daughters died childless, the fund was to go to the testator's two sons in equal shares. If both said sons died childless, the fund was to be held in trust for M. But if said M. should die without leaving issue living at her death, then over. One daughter survived her sister and brothers, and M. survived said daughter, and died without issue. *Held*, that the gift over was contingent on M.'s dying without issue in the lifetime of said sons, and that M.'s representatives were entitled to the fund.—*In re Heathcote's Trusts*, L. R. 9 Ch. 45.

See APPOINTMENT, 1, 2; CHARITY; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; ILLEGITIMATE CHILDREN; MARSHALLING ASSETS; MORTGAGE, 3; TRUST, 3, 5.

## BETTER.

C., a banker at Lyons, received a bill of exchange from D., drawn on a firm at Milan. C. enclosed bills in a letter to D., which he posted. After posting the letter, C. received information from D.'s agent that the Milan firm refused to accept D.'s drafts, and directing him to remit nothing to D. By rules of the French post-office, a letter can be recov-

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ered after it has been posted and before it has been despatched. Accordingly C. applied for his letter to D., but it was forwarded to D. by mistake of the post-office clerk. *Held*, that the property in the bills did not pass to D.—*Ex parte Cole*. *In re Devese*, L. R. 9 Ch. 27.

See GUARANTEE, 2.

## LEX LOCI.

The testator, a domiciled Irishman, disposed of a leasehold estate in England upon the same trusts as those of his other personal estate, which trusts were void under the Thellusson Act in England, though not in Ireland. *Held*, that the bequest of the leasehold estate was invalid.—*Freke v. Lord Carbery*, L. R. 16 Eq. 461.

## LIEN.

1. Solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.—*Belaney v. Ffrench*, L. R. 8 Ch. 918.

2. The creditors of a liquidating debtor resolved, in 1872, to allow him to carry on his business, he accounting to the trustee for the stock in hand as and when disposed of. The debtor carried on his business for two years, when the creditors resolved to sell the same for the benefit of the estate. The business was accordingly sold and the proceeds paid to the trustee. A creditor who had lent the debtor money since 1872 claimed a lien on such part of said proceeds as represented stock purchased after 1872. *Held*, that said creditor had no lien upon any part of the purchase-money.—*Ex parte Robertson*. *In re Magnus*, L. R. 8 Ch. 962.

LIGHT AND AIR.—See PARTY-WALL.

LIS PENDENS.—See EXECUTOR AND ADMINISTRATOR, 4.

MARRIED WOMAN.—See LEGACY, 9.

## MARSHALLING ASSETS.

A testator gave an annuity and certain legacies, devised his real estate in trust for sale and payment of said annuity and legacies from the proceeds, and then bequeathed his personal estate upon trust for payment of so much of the debts and legacies as the proceeds of the real estate might be insufficient to satisfy, and the residue for charitable purposes; and he directed that only such parts of his estate should be included in said residue as might by law be bequeathed for charitable purposes. The testator left real and pure and impure personal estate. *Held*, that the proceeds of the real estate and the impure personal estate must be applied in payment of said annuity and legacies before the pure personal estate.—*Wills v. Bourne*, L. R. 16 Eq. 487.

See WAGES.

## MORTGAGE.

1. A company had power to raise money by mortgage, with or without a power of sale, of

any of the property of the company. The company borrowed money on mortgage, among other things, of its book debts. *Held*, that said mortgage covered debts accrued due since the date of the mortgage.—*Bloomer v. Union Coal and Iron Co.*, 16 Eq. 383.

2. The plaintiff handed title-deeds to a bank with a memorandum stating that the deeds were deposited in consideration of the bank's lending B. £1000 for seven days from date. The bank allowed B. to overdraw his account within said seven days to the extent of £900. *Held*, that there had been no advances to B. according to the terms of said memorandum, and that the bank was not entitled to retain the deeds.—*Burton v. Gay*, L. R. 8 Ch. 932.

3. A testator directed that his debts should be paid, and then gave a certain estate to J., one of his executors, subject to the payment of the testator's debts. J. mortgaged the estate to C., and used the money for his own purposes. C. had no notice of the purpose to which J. intended to apply the mortgage money. *Held*, that the mortgage was valid, and not subject to a charge for the payment of the testator's debts.—*Corser v. Cartwright*, L. R. 8 Ch. 971.

See CHARGE; EXECUTORS AND ADMINISTRATORS, 4; PRIORITY.

## NEGLECTANCE.

By statute, railway trains which travel twenty miles without stopping must maintain means of communication between the passengers and the servants of the company in charge of the train. *Held*, that where a passenger on such a train was injured, the Act was to be taken into account in determining whether there had been negligence.—*Blamires v. Lancashire & Yorkshire Railway Co.*, L. R. 8 Ex. (Ex. Ch.) 282.

See BURDEN OF PROOF; RAILWAY, 1; STATUTE.

NOTICE.—See GUARANTEE, 1; MORTGAGE, 3; PRIORITY, 1.

PARTIES.—See ACTION; VENDOR AND PURCHASER, 1.

## PARTNERSHIP.

1. Where a partnership is terminated prematurely, a person who has paid a premium to become a member of the partnership may lose his right to a return of a proportionate part of the premium by waiver, by wilful repudiation of the partnership contract, and by gross misconduct necessitating the dissolution of the partnership. Discussion concerning forfeiture of such premium by misconduct.—*Wilson v. Johnstone*, L. R. 16 Eq. 606.

2. L. borrowed money in London of W., one of two partners in the firm of W. & Co., bankers at Vienna, and a deed transferring shares in a company from L. to W. & Co. by way of security for said loan was executed by L., and W. who signed as W. & Co. L. held the above shares, but the transfer to him had not been registered at the time he transferred to W. & Co. Subsequently the transfer to W.

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& Co. was registered, and shortly after this the transfer to L. was registered. L. died insolvent, and said company was wound up. *Held*, that W. had authority to accept the transfer of shares from L. so as to bind the firm of W. & Co., and that the irregularities in the registration of the transfers did not affect the liability of W. Co. to call.—*In re Land Credit Company of Ireland. Weiskstein's Case*, L. R. 8 Ch. 831.

8. By articles of partnership it was provided that upon the death of A., (the partner to whom the capital belonged), the share of B., the other partner, in the profits should belong to A.'s representatives, who should carry on the business and pay to B. his share of the profits up to A.'s death. The business was carried on by B., who was A.'s executor, until liquidation was ordered. It then appeared that the stock on hand was partly the old stock formerly belonging to A., but principally new stock bought by B. *Held*, that the terms of said partnership did not convert the stock on hand at A.'s death into separate estate, but that such stock was applicable to payment of the joint firm debts, and that stock bought since A.'s death was B.'s property, and applicable to his separate liabilities.—*Ex parte Morley. In re White*, L. R. 8 Ch. 1026.

See BANKRUPTCY, 2; BILLS AND NOTES, 1.

PARTY-WALL.

Where a wall was a party-wall to the height of the first story, and above that height had ancient windows opening to the external air, it was *held* that the wall was not a party-wall above the height of the first story.—*Weston v. Arnold*, L. R. 8 Ch. 1094.

PATENT.

Upon a decree against a party for infringement of patent the patentee is not entitled to have both an account of profits and an inquiry into damages, but must elect which he will have.—*De Vitre v. Betts*, L. R. 6 H. L. 319. See *Neilson v. Betts*, L. R. 5 H. L. 1; 6 Am. Law Rev. 94.

PAYMENT.—See EVIDENCE, 2.

PEERAGE.—See SETTLEMENT, 4.

PENALTY.

A dock company incorporated by statute agreed to purchase certain land for £4000, half payable upon the execution of the agreement, the remainder on a certain future day. The agreement provided that if the second moiety was not paid by a certain day, in which respect time should be of the essence of the contract, it should be lawful for the vendors to enter and repossess themselves of their former estate without any obligation to repay any part of said sum which might have been paid to them. *Held*, that the above stipulation was in the nature of a penalty, from which the company would be relieved on payment of the residue of the purchase-money remaining unpaid with interest.—*In re Dagenham (Thames) Dock Co. Ex parte Hulse*, L. R. 8 Ch. 1022.

PLEDGE.—See EXECUTORS AND ADMINISTRATORS, 4; MORTGAGE, 2; PRIORITY, 1.

PORTION.—See DEVISE, 6.

POST.—See LETTER.

POWER.

Shares were held in trust for a woman for life, and after her death as she should by deed or will appoint. The trustee and the woman joined in a deed of transfer of the shares to herself. *Held*, that the power of appointment was well executed.—*Marler v. Thomas*, L. R. 17 Eq. 8.

See DEVISE, 2; SETTLEMENT, 2.

PREMIUM.—See PARTNERSHIP, 1.

PRINCIPAL AND AGENT.—See BROKER; INSURANCE, 2.

PRIORITY.

1. L. deposited title-deeds with his bankers to secure advances, and agreed to execute any deeds necessary to carry out the security. Subsequently, when about to be married, the intended wife directed her solicitor to prepare the necessary settlement. The solicitor asked L. if the title-deeds of his land were in his possession unincumbered, and L. replied that they were, but were at his banker's. The solicitor thereupon prepared the settlement whereby the real estate was to be settled upon trusts for the wife and issue of the marriage; and after the marriage L. conveyed the land upon trusts accordingly. *Held*, that the wife had constructive notice of the mortgage to the bankers, also that L.'s contract to execute a legal mortgage gave the bankers a priority over subsequent purchasers without notice.—*Maxfield v. Burton*, L. R. 17 Eq. 15.

2. S. sued out an *elegit* upon a judgment against a railway company. The company subsequently filed a scheme of arrangement, which was confirmed by the court, whereby mortgagees of the railway were to be paid by certain debentures preferred in payment of interest over other stock. *Held*, that S. was not bound by said scheme, but that he could not claim a priority over the holders of said debentures on the ground that their mortgage, which was a charge prior to the *elegit*, had been discharged.—*Stevens v. Mid-Hants Railway Co. London Financial Association v. Stevens*, L. R. 8 Ch. 1064.

PUBLIC POLICY.—See CONTRACT, 6.

RAILWAY.

1. The court ordered an inquiry as to damages where a railway company had exercised its statutory powers carelessly in constructing its railway.—*Biscoe v. Great Eastern Railway Co.*, L. R. 16 Eq. 636.

2. The H. railway company was empowered by statute to make a junction with the G. railway at B. The plaintiff railway company obtained by agreement running powers over the G. railway passing through B. The plaintiffs then, by agreement with the H. railway, obtained the right to use the H. railway; the H. company to keep its line in repair and pro-



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vide a sufficient staff for the traffic of the plaintiffs; the plaintiffs to pay the H. railway a proportion of the through rates and fares by way of commuted toll; and the plaintiffs to haul the local traffic of the H. company, should the latter so desire. The G. Company refused to permit the passage of trains from the plaintiff's line on to the H. railway, alleging that said agreement between the plaintiffs and the H. railway was *ultra vires* and void. *Held*, that said agreement was valid—*Midland Railway Co. v. Great Western Railway Co.*, L. R. 8 Ch. 841.

See CONTRACT, 1; STATUTE.

RATIFICATION.—See CONTRACT, 3.

RECEIPT.—See EVIDENCE, 3.

RECEIVER.—See COMPANY, 3.

REPAIRS.—See DEVISE, 4.

RESIDUE.—See DEVISE, 1, 2, 5; LEGACY, 4, 5.

REVERSION.—See CHARGE.

REVOCATION OF ASSENT.—See LEGACY, 9.

SALE.—See BROKER; CONTRACT, 2; TRUST, 4;  
VENDOR AND PURCHASER.

## SALVAGE.

1. More than half of the proceeds of the property saved, less salvor's expenses, awarded as salvage in *The Rasche*, L. R. 4 Ad. & Ec. 127.

2. Salvage awarded to a steam-tug which attempted unsuccessfully to aid a vessel exhibiting signals of distress.—*The Melpomene*, L. R. 4 Ad. & Ec. 129.

See WAGES.

SATISFACTION.—See DEVISE, 3.

SECURITY.—See BILLS AND NOTES, 1; MORTGAGE, 1; PRIORITY, 2.

## SETTLEMENT.

1. A widower, two days before going through the ceremony of marriage with his deceased wife's sister B., executed a deed reciting that he had previously transferred certain bank shares to trustees, and directing said trustees to hold said shares in trust for B. for life, remainder as B. should by will appoint. The widower and B. lived together as husband and wife until the former's death. *Held*, that said deed could not be set aside as founded upon an illegal consideration.—*Ayerst v. Jenkins*, L. R. 16 Eq. 275.

2. Where a covenant to settle after-acquired property is limited to the case funds of a specified amount are acquired at any one time, such funds must be derived from the same source; and where a person receives funds subject to such a covenant, but over which he has a power of advancement, any sum advanced must be included in determining whether said funds are of sufficient amount to fall within the covenant.—*Hood v. Franklin*, 16 Eq. 496.

3. A settlement was executed by a married woman and a trustee, wherein a sum of money

recited to be in the trustee's hands was settled upon certain trusts. Said recital was untrue; and the deed was executed upon the faith of a promise made by the woman, that she would forthwith pay said sum to the trustee from her separate estate. *Held*, that said promise could not be enforced.—*Marler v. Thomas*, L. R. 17 Eq. 8.

4. By letters-patent a barony was conferred on E. for life, with remainder to her second and other sons and the heirs male of their respective bodies successively. The patent contained a proviso that if any person taking under the patent should succeed to a certain earldom, the succession to the barony should devolve upon the son of said E., or the heir who would be next entitled to said barony if the person succeeding to the earldom was dead without issue male. A testatrix devised lands to trustees in trust to convey, settle, and assure the same in a course of entail, to correspond as nearly as may be with the limitations of said barony and the provisos affecting the same; and a settlement was made accordingly, containing the proviso that if any person taking under the limitations therein contained should succeed to the above earldom, then the succession to said lands should devolve upon the son of said E. or the heir who would be next entitled to succeed to said barony if the person succeeding to said earldom was dead without issue male. The second son of E. afterward succeeded to said earldom, and had issue male. *Held*, that the third son of E. became entitled to said lands upon the succession of said second son of E. to the earldom.—*Cope v. Earl De la Warr*, L. R. 8 Ch. 982.

See COMPANY, 4; DEVISE, 4.

SHAREHOLDER.—See COMPANY, 2, 4, 5; PARTNERSHIP, 2.

SHIP.—See BILL OF LADING; BURDEN OF PROOF; FREIGHT; JURISDICTION; SALVAGE; WAGES.

SOLICITOR.—See LIEN, 1.

SOVEREIGN POWER.—See SETTLEMENT, 4.

SPECIFIC APPROPRIATION.—See BILLS AND NOTES.

SPECIFIC BEQUEST.—See LEGACY, 1.

SPECIFIC PERFORMANCE.—See CONTRACT, 3; JURISDICTION.

STATUTE.—See APPOINTMENT, 2; CORPORATION.

STATUTE OF FRAUDS.—See FRAUDS, STATUTE OF.

STATUTORY POWER.—See RAILWAY, 1.

STOCK EXCHANGE.—See BROKER.

SUCCESSION.—See SETTLEMENT, 4.

SUIT.—See COMPANY.

SURETY.—See GUARANTEE, 1.

TENANT BY THE CURTESY.—See ESTOPPEL.

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## TENANT IN TAIL.

The court refused to order money representing land taken by a railway company under compulsory powers to be paid to a tenant in tail until he had executed a disentailing deed.—*In re Butler's Will*, L. R. 16 Eq. 479.

TESTIMONY.—See EVIDENCE.

TRELUSSON ACT.—See APPOINTMENT, 2.

TITLE.—See LEASE.

## TRADE-MARK.

Injunction to restrain the defendant from using upon their labels the words "nourishing stout," which had been used by the plaintiff on their labels as a trade-mark, refused, on the ground that "nourishing" was a mere English adjective denoting the quality of the stout. Interesting discussion concerning trade-marks.—*Raggett v. Findlater*, L. R. 17 Eq. 29.

TRESPASS.—See LANDLORD AND TENANT.

## TRUST.

1. B., an unmarried woman, called her servant, the plaintiff, into her room, placed an envelope in a box, and gave the box to the plaintiff, telling him that the box would be of service to him some day, but that he must not open it until after her death. B. retained the key of the box. The box was opened after B.'s death, and in said envelope was a paper signed by B., stating that the contents of the box was a deed of gift to the plaintiff of certain real and personal estate described. The plaintiff subsequently found in an out-house an envelope directed to himself and signed by B., of the same date as the aforesaid paper, stating that the plaintiff would find the deeds of an estate mentioned in the first paper, which deeds were to be handed over to the plaintiff "free, and all expenses to be paid out of the bulk and writings of M" (a certain farm). Held, that there was not a valid declaration of trust of said real and personal estate in favor of the plaintiff.—*Wariner v. Rogers*, L. R. 16 Eq. 340.

2. The court refused to permit trustees who had authority to "continue or change securities from time to time, as the majority shall seem met," to invest trust funds in United States bonds or American railway bonds.—*Behell v. Abraham*, L. R. 17 Eq. 24.

3. A testator empowered trustees to apply the annual income of the presumptive shares to which children would be entitled towards the maintenance and education of such children, if the trustees should think fit, notwithstanding the father of such children might be living and able to maintain his children. A suit was instituted for the administration of the testator's estate, and part of the property was sold and the proceeds brought into court. Held, that the court would not interfere with the discretion of the trustees who might apply the income as empowered in the will.—*Brophy v. Bellamy*, L. R. 8 Ch. 799.

4. Trustees being about to sell certain land, and being unable to find a deed of 1819,

through which the grantors, who had conveyed to the trustees in 1858, derived title, made it a condition of sale that the title should begin with the deed of 1858. A bill was filed by a *cestui que trust* to set aside the sale. Held, that said condition might have depreciated the value of the land at the sale, and was improper, and that the sale would be set aside. The smallness of the interest of the *cestui que trust* in the land constituted no objection to the bill.—*Dance v. Goldingham*, L. R. 8 Ch. 902.

5. A testator directed his real estate to be sold, and the proceeds held upon certain trusts, which failed. The lands remained unsold. Held, that said lands, though unsold, must be treated as money, so that the heiress of the testator who took the same having died, her administrator must pay probate duty.—*Attorney-General v. Lomas*, L. R. 9 Ex. 29.

See EXECUTORS AND ADMINISTRATORS, 2;  
SETTLEMENT, 3; VENDOR AND PURCHASER, 1.

ULTRA VIRES.—See COMPANY, 1; RAILWAY, 2.

UNBORN CHILDREN.—See LEGACY, 11.

## VENDOR AND PURCHASER.

1. A testator devised an estate in trust for his daughter for life, remainder to her husband for life, and after the death of the survivor, upon trust to sell and hold the proceeds in trust for all the daughter's children living at the death of such survivor. The daughter had six children living, one having issue two infant children. A petition for sale was filed and assented to by said daughter, her husband, and her children. Held, that an order of sale was not invalid by reason of said infant children not being parties to the petition.—*In re Strutt's Trusts*, L. R. 16 Eq. 629.

2. The defendant sold lands to the plaintiff at auction upon certain conditions, one of which was that the vendors should deliver an abstract of title to the plaintiff within seven days, and all objections not made within a certain period thereafter were to be considered waived; and in case such objection should be made, the vendor reserved the option of rescinding the contract of sale upon repaying the deposit money. An abstract was delivered and objections were made. The defendant thereupon filed a bill for specific performance, and the plaintiff in answer set up said objections, and a further objection, consisting of matters affecting the title which had not been disclosed in the abstract. The bill was dismissed. The defendant rescinded the contract and tendered the deposit, and the plaintiff brought this action against the defendant for not deducing a good title. Held, that the defendant, by bringing the above bill, waived his right to rescind on any of the original objections but that he had a right to rescind upon the additional objection made in the answer, although relating to matters not disclosed in said abstract.—*Gray v. Fowler*, L. R. 8 Ex., and Ex. Ch. 249.

## FLOTSAM AND JETSAM.

## WAGES.

The master of a vessel gave a bottomry bond on ship, freight, and cargo, and also bound himself personally. The bond was indorsed to the owner of the cargo, who began a suit against ship, freight, and cargo, to enforce payment of the bond. The master afterwards instituted a suit against the vessel and freight for his wages. The proceeds of the ship were insufficient to pay said bond, but the proceeds of ship and cargo were sufficient to pay both the bond and the wages. The wages of the master were ordered to be paid from the proceeds of the vessel before any portion of such proceeds was appropriated to payment of said bond.—*The Eugenie*, L. R. 4 Ad. & Ec. 123.

## WALL.—See PARTY-WALL.

WILL.—See APPOINTMENT, 1; CHARITY; ELECTION; EXECUTORS AND ADMINISTRATORS, 2; ILLEGITIMATE CHILDREN; LEGACY; MARSHALLING ASSETS; MORTGAGE, 3; TRUST, 1, 3, 5.

## WORDS.

"All the Money of which I die possessed."—See LEGACY, 3.

"Devolve upon."—See SETTLEMENT, 4.

"From six to eight Weeks."—See CONTRACT, 5.

"Nephews and Nieces."—See LEGACY, 10.

"Quantity and Quality unknown."—See BILL OF LADING.

"Restraint of Princes."—See INSURANCE, 3.

"Succession to."—See SETTLEMENT, 4.

"Then living."—See DEVISE, 3.

## FLOTSAM AND JETSAM.

One has heard of a judge of some kind—an Indian Civil Servant, if we are not mistaken—who said that but for the evidence of the defendant and his witnesses, there would be no difficulty in deciding cases. As long as the plaintiff and his witnesses had the ear of the Court the case seemed as plain as possible, but then came the defendant and his witnesses, and jumbled the case up, and made it quite impossible to come to a decision one way or other.

Mr. Fitzjames Stephen, in the dissertation upon the Law of Evidence which precedes his edition of the Indian Evidence Act, mentions a statement made to him by a barrister who had practised in the Courts of Ceylon. This gentleman said that he could always guess that a Cingalese witness was lying if he observed a peculiar twitch in his toes. We wonder whether the toes of perjurers twitch in this country.

A Royal Commission ought surely to be appointed to inquire and report. And perhaps, before long, the common "take off your glove," bawled by the usher to every witness who comes into the box may give place to "take off your boot," in which case, upon the theory of Mr. Stephen's informant, we might possibly learn something that might be of advantage to Justice.

There appear to be some peculiarities in matters legal in the Orient, as the following extracts from some of our exchanges would seem to testify.

Liu Chang-yee, Governor of Kwangsi, denounces the acting magistrate of Ts'uan Chow for "recklessness and wanton severity." The Governor had already heretofore laid down strict rules concerning the method to be pursued by district magistrates in capital cases. All persons found guilty of murder were to be sent to the high provincial authorities for sentence, and only in extreme cases was authority to be granted, on application, for execution on the spot. Notwithstanding this, the functionary complained of—who was already labouring under a charge of wrongfully releasing a prisoner on bail while in another magistracy—has actually of his own motion beheaded a prisoner, without awaiting the reply to the application he had sent up for permission to execute the sentence locally, on grounds wholly inadequate. The reason alleged for this precipitancy is that the prisoner was in so precarious a condition that, unless executed forthwith, it was doubtful whether he would live long enough to be made a public example. A rescript directs that the offending magistrate be stripped of his rank, and placed on trial to answer for his shortcomings.

The police censors of the south division of Peking memorialise respecting a case of daring highway robbery in broad daylight, which took place on February 13th last. A clerk in a paper shop was proceeding on that day through the southern part of the city, carrying a package containing 420 taels in silver, when the money was snatched from him by a mounted person, whose description is given, and who made off with his plunder. Two Manchu soldiers have been arrested on suspicion, but the case is not clear against them. The assistant magistrate within whose area of jurisdiction the crime was committed is recommended for deprivation of his button, and for further penalties, if he fail in due time to apprehend the actual culprits and recover the stolen property.

TRINITY TERM—OBITUARY NOTICE.

TRINITY TERM—OBITUARY NOTICE.

Died, on the 15th of August last, (18 ), at Ottawa, TRINITY TERM, Esq., in the fulness of years.

It may not be generally known that the ancestors of this venerable and respected member of the Law Society owed their celebrity in life to the monks of old, whilst their unhappy descendant, who immigrated to this country in the year 1792, owes his untimely end to a Monk of the present day, who accomplished his purpose by a deliberate act, we will not say of unparalleled atrocity, but the next thing to it, viz.: an Act of Parliament.

His faculties were unimpaired to the last, and he was as legally lazy as ever he was in his life. After breathing a short prayer for the amendment of sec. 18 of 29 Vic., if possible, he departed this life to join in legal hallelujahs with his demised friends, John Doe and Richard Roe, who perished some years ago of the same complaint.

His remains were conveyed to Toronto in a Grand Trunk, and the procession is expected to start from Osgoode Hall at twelve o'clock on the first paper day of next Term.

The following will be, as nearly as can be gleaned, the order of the procession, with the names of the different individuals who are to figure promiscuously.

DEAF MUTES.

THE MESSENGERS OF THE COURTS.

W. B. HEWARD, Esq.,

Bearing a Standard, on which is to be lithographed a Rule Nisi composed entirely by himself, without swearing.

EXCITED STUDENTS,  
Clothed in astonishment.

THE HEARSE.

| PALL BEARERS.         | Containing<br>THE BODY   | PALL BEARERS.        |
|-----------------------|--------------------------|----------------------|
| SIR SHY O'BARY, A.G.  | "Cepi Corpus,"           | GENERAL ISSUE, C. P. |
| D. MURDER, Esq., Q.C. | Enrolled in<br>PARCHMENT | SIR E. JOINDER.      |
| SIR E. BUTTER.        | Tied up with             | G. C. A. PEEL, Esq.  |
| SIR CUTS SPRING.      | Red Tape                 | SIR O'GATE.          |
| A. SUEZ, Esq.         | and<br>Docketed.         | E. S. GROW, Esq.     |

CHIEF/MOORWHESS.

MICH'L. MASS, Esq.

E. STARR, Esq.

HILL: TERM, Esq.

Followed by

THE CHIEF JUSTICE.

TWO PUNIES.

THE CHANCELLOR.

HIS TWO VICES.

THE CHIEF JUSTICE, C. P.

THE TWINS,

CHANG AND ENG.

THE COUNTY JUDGES,  
Without any divisions.

THE TREASURER OF THE LAW SOCIETY.

THE BENCHERS.

THE LIBRARIAN IN A GOOD TEMPER,  
and new Wig.

THE BAND,

Composed of plucked Law Students, deeply wailing.

[Sentries.] THE U. C. LAW JOURNAL. [Sentries.]

THE GOVERNOR OF THE GAOL,  
Arm in arm with Habeas Corpus, Esq.

A STRING OF FENIANS WITH KETCH'S NEW  
SILENT COLLARS,  
Inscribed "Sus. per Coll."

TWO ROWS OF TIPSY ORANGE WOMEN.

THE CRIER OF THE COURT,

Bearing aloft the last Fl. Fa. issued during the lifetime  
of the deceased, with the well-known motto,  
"Nulla Bona."

JUBILANT SHERIFFS,

Who have not read the Act, and think they will not be  
required to return any more Writs.

MELANCHOLY SHERIFFS,

With unrequited attachments, and possibility of issue  
extinct.

A HOST OF COSONERS.

Closely followed by

ELISORS.

DIVISION COURT BAILIFFS.

The Funeral Sermon will be preached by a distinguished  
Canadian Prelate who was unanimously elected  
to his own Diocese.

The Text will be

"QUARE FREMUERUNT GENTES."

EPIGRAPH

"Læus deo."

[NOTE.—It will be remembered that at the time the above was written Lord Monck was Governor General; the Chancellor was the much lamented Hon. P. M. Vankoughnet; that Mr. Justice Adam Wilson and Mr. Justice John Wilson were in the Court of Common Pleas; that the late Hugh N. Gwynne, Esq., was Librarian and Examiner. We are pleased to add that Mr. Howard is still Clerk in Chambers, but whether that "Rule Nisi" has yet been lithographed, we are unable to say.—ED. L. J.]

## REVIEWS.

## REVIEWS.

CASES DETERMINED BY THE SUPREME COURT OF NEW BRUNSWICK. Vol. II. Reported by William Pugsley, Jr., A.B. Saint John, N. B., 1874.

We are in receipt of the first and second number of this volume of reports. Mr. Pugsley explains in a short preface that the publication of the reports of the Supreme Court of the Province being in arrears, it has been arranged that he should publish the cases from Hilary Term, 1872, inclusive, and that the former reporter, Mr. Hannay, shall complete his second volume with the cases of Michaelmas Term, 1871. In order, however, that the current decisions may not be delayed, Mr. Pugsley commences his second volume with these contemporaneous cases, and will hereafter publish his first volume. This, therefore, is a very suitable time for our readers to subscribe for these reports, and there are very substantial reasons why their circulation should not be limited to the professional circles of New Brunswick. The common law of England obtains there, as here; their local statutes, arising from similar circumstances, are many of them similar in character to ours; while the statutes of the Dominion apply alike in both provinces. Decisions upon these subjects in the New Brunswick Court must of necessity be interesting and instructive to the bar of Ontario. The handsome appearance and varied character of the contents of the number before us, commend them to the patronage of the profession. The cases as reported bear very satisfactory testimony to the care and ability with which Mr. Pugsley attends to his duties: the observations and questions of the judges during the argument are pointedly given, and the citations are verified with great accuracy. The reporter evidently discharges his work as a labor of love, and in no grudging or perfunctory style.

Among the cases reported we may mention *In re Harrison*, p. 11, wherein is an interesting discussion as to the effect of the local Homestead Exemption Act, in which the owner thereof becomes insolvent. The Court seem disposed to hold that the Act, giving as it does exemption from seizure under execution to real estate, is in conflict with the Dominion Act relating to insolvency, and

therefore *ultra vires* in so far as it affects traders, while perfectly valid as to non-traders. *Wiggins v. Teovil*, p. 31, is a decision in equity where a very well-considered and elaborate judgment is given by Allen, J., upon the question as to whether, when the directors of a bank have determined to increase the capital stock of the bank, and with that purpose shares were allotted from the accumulated profits, such shares were to be treated as a part of the "dividends, interest, and annual produce" of certain shares of the capital stock of the bank bequeathed to a testator. Unfortunately, in the number of the reports we have, there is a hiatus from p. 40 to p. 57, so that we had to stop short in the perusal of this interesting judgment. We find also a case relating to municipal aid to railways, *Ex parte the N. B. R. Co.*, p. 78, in which it is held that a municipality authorized to take stock in a company incorporated for the construction of a line of railway particularly defined by the Act, is not bound to issue debentures to a company not incorporated to construct that specific line, a subscription to their stock-list by the warden being a nullity. In *McGowan v. Betts*, p. 90, it was decided that the notice of action required by the Fisheries Act, 31 Vict. c. 61, sec. 13, does not apply to an action of replevin. In *Reg. v. McMillan*, p. 110, the interminable liquor question came up, and the Court held that the local Act imposing fines and penalties for selling liquor without licence is not *ultra vires* since Confederation; and though there may be thereunder a question as to the power of the local legislature to direct the manner in which the fines shall be recovered, the excess only, that is the mode of recovery, would be void.

It seems that questions arising upon assessments may be brought before the Supreme Court for decision. There should be such a provision here. Among such cases is *Ex p. Smith*, p. 147, where it was ruled that a clerk in the Provincial Secretary's office in Fredericton, who resides outside of the city, is not a "person carrying on business," within the meaning of the local Assessment Act, so as to make him an inhabitant of the city for the purposes of taxation.

In *Reynolds v. Vaughan*, p. 159, it was held that the payee of a note is not a "subsequent party," and cannot render it

## REVIEWS.

valid by affixing a double stamp duty, if the proper duty has not been paid at the time of issuing the note. Nor is an attorney who merely receives the note for collection such a "holder" as the Act contemplates. He must have a beneficial interest in the note. A novel point arose in *Ex p. Bejean*, p. 200, where the Court held that a debtor who assigns under the Insolvent Act of 1869, cannot, if then in custody, obtain an order for support under the Confined Debtors Act, and can receive his discharge only in the manner pointed out by the former Act.

There are many other important cases, relating to wild land taxes, insurance, railways, and riparian rights, for which, however, we have not further space.

AMERICAN LAW REVIEW. Little, Brown & Co., Boston. July, 1874.

In this number, which concludes Vol. 8 of this admirable Law Review, are discussed, "The Fraudulent Misrepresentations of Agents," "The Three Degrees of Negligence," "Testamentary Powers of Sale."

THE FORUM LAW REVIEW. Baltimore: Henry Taylor & Co.

This is a new review published in the South-Quarterly, as we take it, though it is nowhere so stated. The first number issued in January, and was then designated "The Bench and Bar Review." But with the second number, of which we are just in receipt, and issued as of April, the name is changed to "The Forum." The occasion of the change is that there was already a "Bench and Bar," a monthly legal periodical, published, we think, at Chicago, and it was deemed desirable to change the name so as to avoid confusion. The characteristics of this new serial are much the same as those of the *Southern Law Review*, of which we have heretofore spoken with commendation. One of its specialties is, furnishing in each number the portrait of some distinguished jurist or lawyer. Those already given are Caleb Cushing and Reverdy Johnson. In the last number there is a paper on the valid voluntary settlement of a chose in action, which, we think, we remember to have seen first in the *Solicitors' Journal*, and it is perhaps an oversight that no credit

is given in *The Forum* for the article in question. The papers it contains on the civil law are of a very satisfactory character, and manifest a comprehensive grasp of the subject. We by no means complain of the article on William Pinckney, at Bel Air, as some captious writers, "who are nothing if not critical," seem to have done. No one would imagine the account to be literally true, but *si non e vere e ben trovato*; if it is not true it ought to be.

BRITISH QUARTERLY. July, 1874. Leonard Scott Publishing Co., New York.

The principal articles for this quarter are, "The Depths of the Sea," "Lord Ellenborough," "Indian Administration," "Society, Philosophy and Religion," a political article, and an amusing history of "Finger Rings."

BLACKWOOD'S MAGAZINE for July, the first number of a new volume, is now before us. The most noticeable articles among its contents are: "Family Jewels," "Two Cities—Two Books," and "Brackenbury's Narrative of the Ashanti War."

The first is a collection of gems of verse which have a family likeness; examples of one subject variously treated by poets of different ages.

In the second we have a picture of Florence, in connection with George Eliot's "Romola;" and Venice, with which is associated in like manner George Sand's "Consuelo."

The third of these articles is a review of an "authentic memoir of that extraordinary war which England made on the Gold Coast last winter." The book tells of the "ancient history of the region;" "the troubles of the governors and traders of old;" "the Ashanti invasion which led to this last war, and the steps taken to meet it;" its results, and the prospects of the settlements, giving altogether a very fair idea of the whole subject. The writer was Assistant Military Secretary to General Wolseley, and speaks *ex cathedra*, and the reviewer speaks very highly of the book as a truthful narrative of the war and its causes.

The serials, "Alice Lorraine" and "Valentine and his Brother," are continued.

## LAW SOCIETY—EASTER TERM, 1874.

**LAW SOCIETY OF UPPER CANADA**

OSGOODE HALL, EASTER TERM, 37TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

JOSEPH ROBERT THERON.  
PETER MCGILL BARKER.  
CHARLES EMMET RYMERSON.  
ALFRED SERVOS BALL.  
CHARLES EDGAR BARKER.  
FRANK D. MOORE.  
HARVEY MADDEN DEROUER.  
CLARENCE WIDMER BALL.  
E. GEORGE PATTERSON.  
GEORGE LEVACK B. FRASER.

These gentlemen are called in the order in which they entered the Society and not in the order of merit. Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

JOSEPH JAMES GORMULLY.  
E. GEORGE PATTERSON.  
THOMAS HORACE MCGUIRE.  
CHARLES EMMET RYMERSON.  
DAVID ROBERTSON.  
GEORGE LEVACK B. FRASER.  
A. BASIE KLEIN.  
ALFRED TRYVOS BALL.  
JOSIAH R. MITCHELL.  
ARTHUR LYTHERBET COLVILLE.  
CLARENCE WIDMER BALL.  
D. ELLIS MCMILLAN.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

*Graduates.*

GEORGE ROBERT GRANTY.  
JOHN MAXWELL.  
WILLIAM SETON GORDON.  
JAMES CRAIG.

*Junior Class.*

FRANK FITZGERALD.  
DUNCAN DENNIS RYMERSON.  
DAVID HALDANE FLETCHER.  
ISAAC CAMPBELL.  
JAS. W. HOLMES.  
NICHOLAS DUBOIS BUCK.  
ARTHUR BRADY.  
JOHN SANDFIELD McDONALD.  
JOHN ARTHUR PATRICK MCMANON.  
WILLIAM JAMES LAVERY.  
JOHN LEWIS.  
ANDREW HALLLEY HUNTER.  
JOHN JACOB WHEELER STONE.  
JOHN GIBSON CUMMEL.  
MAXFIELD SHUTTARD.  
GEORGE ALBERT FLETCHER ANDREWS.  
WALTER JAMES READ.  
THOMAS WILLIAM PHILLIPS.  
NATHANIEL MILLS.  
JOHN MALCOLM MURPHY.  
JOHN JOSEPH BLAKE.  
WM. HENRY STEVENS.  
CHARLES EMMET MCDONALD.  
COLIN SCOTT RANKIN.  
CHARLES MICHAEL FOLLY.  
JOHN GREGORY KELLY.  
JOHN ROSS MCCOLL, and  
HARVEY JOSEPH BRAUNHART as an articled clerk.

*Ordered*, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the and of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams' Equity, Smith's Manual; Common Law, Smith's Manual; As respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 82, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Bent on Evidence, Smith on Contracts, Snell's Treatise on Equity the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLIARD CAMERON,

Treasurer.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR OCTOBER.

- 1 Thurs..Master & Reg. in Chy., Clks. & Dep. Clks. Crn. to make ret. of fees.
- 2 Fri.....Last day for notice of prin. exams.
- 4 SUN...18th Sunday after Trinity.
- 5 Mon...County Court Term begins.
- 8 Thurs..Chicago fire, 1871.
- 10 Sat....Quebec Conf., 1864. Last d. for Master and Reg. in Chy., Clks. and Dep. Clks. Crown to pay over fees. to Prov. Treas. Co. Ct. Term ends.
- 11 SUN...19th Sunday after Trinity.
- 15 Thurs..Law of England introduced into Upper Canada, 1792.
- 18 SUN...20th Sunday after Trinity. St. Luke.
- 21 Wed...Battle of Trafalgar, 1805.
- 23 Fri....San Juan Boundary Award made, 1872.
- 25 SUN...21st Sunday after Trinity. St. Crispin. Charge of the Light Brigade, 1864.
- 28 Wed...SS. Simon and Jude. Leave art. with Sec. Law Soc. (28 V. c. 21, s. 5.) Treas. (32 V. c. 36, s. 92.)
- 31 Sat....Hallow'en. Local Clk. to certify N. R. taxes to Co.

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## THE

## Canada Law Journal.

Toronto, October, 1874.

We call attention to the reports of some more election cases in other columns. The well-considered and able judgment of His Honor Judge Gowan in *Booth v. Sutherland* will be read with interest, in connection with the London case, and the suggestive remarks of Chief Justice Hagarty as to whether a candidate is disqualified by corrupt acts on the part of his agents, a point which will come up for decision in the latter case.

The beginning of the inevitable end of law reform in England has been lately announced by the Lord Chancellor, who stated in the House of Lords that he hoped, on behalf of the Government, at the commencement of next session, to make a proposal for a codification of the common law. This will be in effect a condensation and consolidation of the standard text-books upon the *lex non scripta*, and is altogether "a consummation devoutly to be wished."

An objection was made in the English Divorce Court lately to the reception of an affidavit on the ground that it was made on Sunday. Reference was made to *Doed. Williamson v. Roe*, 3 D. & L., 328, *Mackalley's case*: 9 Co. R., 66, b, and 29 Car. ii., c. 7, s. 6, which Lord Holt thought was intended to restrain all sorts of legal proceedings on this day, (Lord Raym., 705.) But Sir James Hannen considered none of these authorities were in point, and overruled the objection: 18 Sol. J., 642.



## EDITORIAL ITEMS.

The *Albany Law Journal* advertises a treatise on the Law of Nuisances, soon to be published, written by H. S. Wood, a member of the Albany Bar, which, we are told, is a "*comprehensible* and exhaustive treatise upon this branch of the law." We shall welcome such an addition to legal literature, and in the present age of fast reading and rapid book-making the fact that this volume will be comprehensible is no small merit.

Eight Election cases have, up to this time, been tried, and the candidates have one and all succumbed to the legal test. Not much in the way of interest to the legal profession has to be noted, but a large amount of bribery and corruption has been laid bare, and much doubtless, never came to light at all. So far, the only cases that seem worth reporting are the London case, the South Renfrew case, the Cornwall case, and the West Northumberland case. The first brings up the question as to whether a candidate is disqualified by acts of his agents under Sec. 18 of the Election Act of 1873 and some other points of interest, and the last two as to costs. We can only make space for the first two in this issue.

The Autumn Assize list and the new Rules of the Queen's Bench and Common Pleas, which appear at the end of this journal, mark an epoch in the administration of justice in Ontario. They tell us of the revival of Trinity Term—the transaction of Court business by a single Judge, instead of by a Bench of Judges as before—the hearing of causes, which heretofore could only be heard in Term, twice a week during the year—the formation of two new circuits, and the presence at these two circuits of the two new Justices of Appeal. What with these changes, and the new practice introduced by the

Administration of Justice Act, and the innumerable other Acts of the Dominion and the Ontario Legislature, in addition to the Reports to be read, marked, learned, &c., it behoves a lawyer in this Province to "look alive." But from the nightmare of case law, at least, they will be relieved by Mr. Robinson's coming digest, whilst there is good hope that the wheels of litigation will move smoothly, oiled by the provisions of the Acts for the administration of justice.

A legal journal of good repute on the other side of the "herring pond," in copying an article which appeared in our columns some months ago, describing a Court scene in Ohio, speaks of it as "*A Canada Law Court*." It may be desirable to instruct our generally well-informed friend that Ohio is one of the United States of America, and that the Dominion of Canada has not as yet annexed it. We are thinking of doing so, however, and when we do, shall be glad to assist a few of the junior editors of journals in England and Ireland to vacancies in some of the classes in geography for small boys. We may mention as an item of interest in the meantime, that as far as extent of country is concerned, the British Isles and Ohio together are somewhat in the same proportion to Canada as Switzerland is to Russia. The ignorance of some of the "tight little Islanders" about matters situated a trifle beyond the length of their own noses is truly wonderful, though by no means a novel subject of merriment.

An occasional correspondent in Nova Scotia speaks of the crowded dockets there and the accumulation of arrears, owing partly to the fact that there has been a vacancy on the Bench since the beginning of the year, which had not, at the time he wrote, been filled up. The names of Hon. W. A. Henry, Q.C., and Messrs.

## STATUTES OF CANADA, 1874.

J.W. Johnston, Q.C., H.W. Smith, Q.C., A. James, Q.C., and others have also been spoken of in connection with the vacancy. In the mean time the press are discussing the best means of disposing of the arrears, and the lawyers are having a hand in the fight, which has unfortunately assumed something of a personal character.

Our brethren have also, like ourselves, had some differences in regard to the appointment of Queen's Counsel and precedence at the Bar, and a question of precedence has been raised in Court. A large number of Queen's Counsel were appointed by the late Dominion Government in Nova Scotia. The Local Government had not made any such appointments since the Union was effected; but last winter an Act was passed by the Local Legislature to regulate the precedence of the Bar. This was apparently intended to deprive such Q. C.'s as were appointed by the Dominion Government since 1867 of the precedence claimed by them by virtue of their patents, and to give them only that which they would have had in case they had not received "silks." A motion was made to test the question, but the Court intimated that, apart from other considerations, the Act was not sufficiently clear to warrant a positive expression of opinion at the time, and the matter now stands until the first day of next December Term, when it will no doubt be fully discussed.

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STATUTES OF CANADA, 1874.

The Dominion statute-book for last session has lately made its appearance. It is almost equal in bulk to that of the previous year, although not quite up to the measure of the last volume of the Ontario statutes. While some of the Acts are of importance in a commercial and financial point of view, and while others indicate the rapid progress

and development of the Dominion in its multiform interests and multiplying resources, yet comparatively few of the chapters are of immediate practical consequence to the legal profession in this Province. Some there are, however, to which we think it well to call the attention of our readers.

Chapter 25 provides for the assimilation of the laws in the different provinces with regard to the liabilities and rights of carriers by water. It requires them to receive and convey all goods and passengers offered for conveyance, unless there is sufficient cause for not doing so; it makes them responsible not only for goods received on board vessels, but also for goods delivered to them for conveyance; it exempts them from liability in case any loss arises from fire or dangers of navigation, or from robbery or irresistible force, and also from any defect in the nature of the goods themselves,—provided that such damage happens without their actual fault or privity; special provisions are made for loss of valuables, and the carriers are declared to be liable for the loss of "personal baggage," but not ordinarily to a greater extent than five hundred dollars. The exemptions from liability are similar to those contained in the English statute 26 Geo III. c. 86, which extends to cases of fire and robbery, and the others are such as are usually found in a bill of lading. It would probably be held that none of the words are large enough to cover a loss occasioned by the depredations of rats on the cargo: see *Kay v. Wheeler*, L. R. 2 C. P. 302. The statute will declare the law in the absence of any particular stipulation between the parties, but of course it will not prohibit them from making such special arrangement as to the carriage of goods or passengers as they may agree upon.

## STATUTES OF CANADA, 1874.

Chapter 37 is entitled An Act for the suppression of voluntary and extra-judicial oaths. The preamble recites that "doubts had arisen whether or not such proceeding is illegal," i. e. the practice of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial enquiry. But after the emphatic language of Draper, C. J., in *Jackson v. Kassel*, 26 U. C. Q. B. 345, it was rather superfluous to recite that the practice was of doubtful legality. The learned Chief Justice remarks, "There is a strong dictum in one of the late editions of Burn's Justice, that a magistrate taking an affidavit without authority is guilty of a misdemeanour. I have often called attention to this, and more often to the practice of Commissioners taking affidavits in matters not in the Court. There is a case reported, though I cannot put my hand on it, of a criminal information brought for this." Rather, then, may it be said that the reprehensible practice is one of undoubted illegality; but it was well for the Legislature to declare the law upon the subject so unmistakeably that magistrates and others who are not wont to read the reports may be left without excuse, if they continue to break the law in this respect.

It would have been advisable if some provision had been made in this statute for the taking of affidavits as to death, heirship, and the like matters, involved in the investigation of titles. This is a simple and inexpensive way of verifying isolated facts which has long been used in this Province, and we trust the effect of the statute may not be to necessitate the institution of proceedings under the Act for Quieting Titles, when such evidence of the transmission of interest in lands is required. It would have been well, also, if it had been expressly mentioned in the Act that affidavits called for by the usual conditions of fire-insurance policies were not intended to be interfered with by this statute.

Chapter 38 is intended to regulate the law of libel and render it uniform throughout all portions of Canada. It makes very slight change in the law of this Province relating to indictments or informations for defamatory libels, chiefly in so far only as it increases the severity of the sentence. The whole of the Act, with the exception of sections 5, 11 and 13, may be found substantially, and almost literally, in the Consolidated Statutes of Upper-Canada, chapter 103. The excepted sections provide that on a plea of justification being pleaded the truth of the matters charged may be inquired into, but shall not form a defence unless it was for the public benefit that the matters charged should be published. (This language is taken from the English statute 6 & 7 Vict. cap. 96, sec. 6.) Further, that the right of the Crown to set aside jurors till the panel is gone through shall not be allowed to a private prosecutor. Lastly, that as between private prosecutor and defendant, costs shall be recoverable either by warrant of distress or by suit on the bill of costs as for an ordinary debt.

Chapter 47 relates to bills of exchange and promissory notes. It provides for sending notice of protest by addressing the same to the party at the place where the note is dated, unless the party has designated another address under his signature. Provision is also made for giving validity to unstamped or insufficiently stamped notes, even pending suit thereon. If it appears that the holder took the same without knowledge of the defects, and in technical phrase "innocently," then he can cure the objections and render the instrument valid by affixing double stamps as soon as he is aware of the error or mistake. We do not see that much change is made in the law by this latter enactment. It leaves it pretty much as it was under the section of the former Act which it repeals. It extends the law in permitting to be cured certain

## RELATIVE IMPORTANCE OF CASE-LAW.

other defects of form, as to date or erasure of the stamps or wrong date thereon,—but this only in the hands of an innocent holder.

We notice that the index of this volume still exhibits the time-honored nuisance of referring from one title to another before the required page can be found. Thus, for example, if one looks up "Promissory Notes," all one finds is "See Bills and Notes." Would it not be much better and simpler to give the page at once, and not add another element of bitterness to the much-vexed life of the busy practitioner?

### RELATIVE IMPORTANCE OF CASE-LAW.

English Case-Law may be divided for the purposes of the present inquiry into Reported and Unreported decisions.

As to the reported decisions, a distinction has been made regarding the value to be attached to different reports of the same case, and particularly as to whether or not the decision has appeared in what are known as the Regular Reports. Again, as to reported decisions, a further subdivision may be made, based upon the difference in the tribunals where the decision has been given, as for instance in Chambers, at Nisi Prius, in Banc or in Appeal.

Dealing first and briefly with unreported decisions, they are generally the refuge of the hard-pressed counsel, who, finding nothing to justify his position, adopts the expedient of invoking the shadowy authority of some traditional case "just in point." These sort of authorities have been jocularly called "pocket-pistol law," and the citation of them is hardly justified even by the necessities of counsel. The judicial estimate of such authorities is well indicated in the observations of the Master of the Rolls, in *Knight v. Bowyer*, 23, Beav.

627. Referring to an unreported decision which had been cited, he remarks, "This case is not reported either in print or manuscript, but the case is cited from the proceedings in the cause filed in the Chancery office. It is extremely difficult to rest safely on a case not reported by any competent person, when the grounds of the decision are to be picked out of the facts appearing on the recorded proceedings alone, when, if the case had been reported, it might have been found that, in truth, some other matter than that supposed was the principal cause of the dismissal of the bill. If the case had been seriously argued it would probably have been reported."

Next, as to the so-called unauthorized reports, the rule is now pretty well established that no Judge will refuse to refer to and act upon a case simply because it does not appear in the regular reports. The decisions reported in the *Law Journal*, *Law Times* and *Weekly Reporter*, in advance of the regular series, are and have long been of great value to the profession. Indeed, in many cases it has been matter of observation from the Bench that a report in the serials has elucidated the more obscure report of the same case in the official reports. In *Francome v. Francome*, 11 Jur., N. S., 123, Lord Chancellor Westbury observed, "I do not decline to follow the case cited because it is reported in the unauthorized reports (18 Jur., 1051). It is of such materials that the law of England is made up, and I should be denying myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in those useful publications." See also per Stuart, V. C., in S. C. 11 L. T. N. S. 666. In a recent decision of the full Court of Chancery, in this Province, *Bank of Montreal v. McFaul*, 17 Gr., 234, the majority of the Court gave effect to a decision reported only in the *Weekly Re-*

## RELATIVE IMPORTANCE OF CASE-LAW—LAW SOCIETY.

porter, (*Defries v. Smith*, 10 W. R., 189), though the Chancellor declined to follow it, and dissented from the judgment of the Court. In *Iansen v. Paxton*, 23 U. C. C. P., 457, Richards, C. J., observes: "The *Law Journal* Reports have generally been favourably spoken of, both by the profession and the bench."

We notice that the present Master of the Rolls, Sir George Jessel, has said that the *Weekly Notes* are not intended for citation as authorities, and he has refused to allow them to be cited before him: *Attorney-General v. Cockermouth Board*, 22 W. R. 620. But surely they are of worth at least equal to the *Notes of Cases*, which are frequently referred to in maritime and ecclesiastical causes, and their value as *pro tempore* guides, till the fuller reports appear, should not be overlooked.

Coming next to the regularly-reported cases, perhaps those lowest and of least authority are *Nisi Prius* decisions. In many cases these rulings and holdings are necessarily given on the spur of the moment, and before publication require the careful pruning and consideration which Campbell gave to his reports. They are also useful when accompanied by the elaborate system of commentary, which Foster and Finlason append to the cases reported by them. But the Judges themselves are not well satisfied with such cases being reported and do not deem them of much value when cited before them *in banc*, as will appear from the few quotations which follow:

"As to the *nisi prius* cases, it would have been much better for the law if the crude opinions of Judges at *Nisi Prius* had never been allowed to be quoted to those who are sitting *in banc*:" per Best, J. in *Rowe v. Young*, 2 B. & B., 185. "Very likely one's first thoughts at *Nisi Prius* may be wrong, and I am extremely sorry they are ever reported; and still more so that they are ever men-

tioned again:" per Bayley, J. in 1 Chit. R. 121. "A sad use is made of these *Nisi Prius* cases:" Gibbs, C. J. in *Tompkins v. Wiltshire*, 1 Marsh. 116. See per Best, C. J. in *Johnson v. Lawson*, 2 Bing. 86. "*Buck v. Stacey*, 2 C. & P. 465, has been approved of by eminent Judges, and so lifted out of the sphere of a mere *Nisi Prius* decision:" per Lord Chelmsford, C. in *Calcraft v. Thompson*, 15 W. R. 387.

(To be continued.)

## LAW SOCIETY.

## TRINITY TERM—38th Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:—

Monday, 24th August.

The several gentlemen whose names are published in the usual lists were called to the Bar, and received certificates of fitness.

Tuesday, 25th August.

The Report of the Examining Committee was received, read and adopted.

The Treasurer reported the result of the Intermediate Examinations.

The Treasurer laid before Convocation a communication received from the Attorney-General of Ontario relative to the new boilers for heating Osgoode Hall.

The Abstract of Balance Sheet was laid on the table.

Messrs. Vankoughnet, McMichael, Martin, Meredith and Lemon, were appointed Examining Committee for next Term.

Thomas Robertson, Esq., Q.C., and Thomas Hodgins, Esq., Q.C., were elected Benchers in place of G. W. Burton, Esq., Q.C., and C. S. Patterson, Esq., Q.C., appointed Judges of the Court of Appeal.

Messrs. Hodgins and Robertson were appointed members of the Legal Education Committee in the place of Messrs. Burton and Patterson.

## LAW SOCIETY—CRITERIA OF NEGLIGENCE.

Mr. Clarke Gamble was appointed a member of the Finance Committee in the place of Mr. Patterson.

*Saturday, 29th August.*

Messrs. Moss, McMichael and Read were appointed a committee to examine the Journals of Convocation for the last year, and report the names of any Benchers who have not attended any meeting of Convocation during that period.

The usual fee was ordered to be paid the Examiner for this Term, and Mr. Evans was appointed to that office for next Term.

*Friday, 4th September.*

The Treasurer read to Convocation a letter from the Hon. John Crawford, resigning his seat as Benchers.

Ordered, that his resignation be accepted, and that an election do take place, on the first Tuesday of next Term, of a Benchers to fill the vacancy created by his resignation.

The Petition of B. V. Elliott to be admitted an Attorney, under a special Act of the Legislature of Ontario, 37 Vict., cap. 89, was granted.

The Petition of J. McBride, in reference to his Certificates, granted on payment of costs.

The Petition of C. W. Cooper, in reference to his Certificates, granted on payment of costs.

Ordered, that the roof of the East Wing be repaired, and that no visitors be allowed to go upon it.

Ordered, that whenever an Attorney receives a Certificate of Fitness as an Attorney, entitled under either a Special Statute or the General Statutes applying to Attorneys of the Courts of the United Kingdom or Colonies, he shall pay the full fees as if he had been articled and admitted after the usual service in Ontario.

Ordered, that the necessary improvements to the hall, staircase and passages of the East Wing of the building be completed.

The application of D. M. McDonald for remission of his Certificate fees, on the ground that he was not a practising Attorney, was granted.

J. HILLYARD CAMERON,  
*Treasurer.*

## SELECTIONS.

## CRITERIA OF NEGLIGENCE.

The question how far bailees are liable for negligence, and whether damages should follow under certain circumstances, has exercised the judicial mind perhaps as much as any other department or branch of jurisprudence.

Many important and recent adjudications upon the liability of a bailee have entirely failed to define the criteria of negligence, doubtless for the obvious reason that the degree of care demanded of bailees varies widely, according to the character of the bailment and particular circumstances bearing upon each case. And true it is, that common sense would dictate that much greater diligence devolves upon the depositary holding millions of gold coin, or convertible United States bonds, than that of a depositary of non-negotiable railroad bonds. Thus, the rule most recently laid down seems to be that, where the consequences of negligence would result in serious injury to the depositor, and where the means of avoiding the damage are mainly within the depositary's power, ordinary care requires the *utmost degree of human vigilance and foresight*: *Kelly v. Barney*, 2 Kern. 420.

The standard of ordinary care and skill being on the advance, the banker, broker and every bailee, as well as carriers of passengers, are bound to be vigilant and provide suitable and such improved means or engines of safety, concerning the thing bailed or carried, as may be within their power. The question of degree of negligence has been frequently and largely discussed in cases resulting from railroad accidents, as well as from burglaries and robberies.

## CRITERIA OF NEGLIGENCE.

In the action of *Dike v. The Erie Railway Co.*, growing out of the Port Jarvis disaster, some five years ago, which was tried in Brooklyn, the case turned principally upon the point, whether or not the company had used defective rails, as that was the proximate cause of the accident, and it being so proved, the plaintiff recovered a large verdict in way of damages for such negligence. Likewise in *Hagerman v. The Western Railroad Co.*, 3 Kern. 9, the case hinged upon the evidence as to care and skill of the company in selecting proper axletrees for their road. Held, that the defendants were liable if the defect could have been discovered in the course of its manufacture, by any process or test known to the skilful in such particular business.

Whether want of care be imputed to a person or corporation must necessarily depend upon a combination of circumstances, which essentially determine the issue. Negligence has been well defined to be either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; *Blyth v. The Birmingham Water Works Co.*, 36 E. L. & E. 508; *Brown v. Lynn*, 31 Penn. 512; *Ernst v. H. R. Railroad Co.*, 35 N. Y. 9.

Thus, in modern jurisprudence, negligence may well be said to be an absence of care according to the circumstances of the case. See *Vaughan v. Taff Vale Railroad Co.*, 5 H. & N. 686; *Bilbee v. Railway Co.*, 114 E. C. L. 592.

That there can be no criteria of negligence would seem to be further indicated from cases quite recently tried, resulting from bank robberies. The case of *David Scott v. The Kensington National Bank*, being an action to recover certain moneys stolen from the bank by robbers (tried in Philadelphia some months ago), the allegations of the plaintiff being that the bank was negligent in having a watchman in attendance who allowed two or three men, who pretended to be of the city police, to enter the bank after hours; the consequence being that the watchman was gagged, and the pseudo policemen blew open the safe and took all they wanted. A judgment was given in favour of the plaintiff. And it will be remembered that a similar case occurred in Cleveland last year, and was tried; resulting favourably to the plain-

tiff; *Perkins v. The Second National Bank of Cleveland*. The case, also, of *The First National Bank of Lyons v. The Ocean National Bank of the City of New York*, growing out of a burglarious entry into the bank between Saturday night and Monday morning; such entrance to the bank being effected from the basement, which was occupied by a tenant of the bank, and who was supposed to have been the guilty party, the case turning upon the issue of negligence in having such a tenant.

An exhaustive case, and a very interesting one as to the degree of care requisite in various bailments, is that of the *Steamboat New World v. King*, 16 U. S. 472.

In general, it has latterly been held that, in gratuitous bailments, it is not enough that the defendant took the same care of the bailor's property as he did of his own; but he is required also to go further and show that he took proper care, and as a prudent and reasonable man would of such property. In the case of *Doorman v. Jenkins*, where a bailee left valuables of his own, and those of the plaintiff, in an unsafe place and they were stolen, it was explicitly held that the fact of the defendant having lost his own property in that way was wholly immaterial. Also see 2 Add. & Ell. 256; *Tracy v. Wood*, 3 Mason, 132.

Mr. Justice Nelson, in delivering the opinion of the court, *Chicopee Bank v. Philadelphia Bank*, 8 Wall. (U. S.) 641, went so far as to say that the loss of the bills by the bank carried with it the presumption of negligence and want of care; and if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. And he remarked: "When a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is, that the loss or damage was occasioned by his negligence or want of care of himself or his servants."

As in contrast to some of the cases cited, see *Foster v. Essex Bank*, 17 Mass. Ordinary care is requisite where the bailment is beneficial to the bailor and bailee. 2 Kent's Com. 587. Where life

## COLONIAL ATTORNEYS—DISTRESS AND RE-ENTRY.

is involved and endangered, the degree of care required is, of course, much greater. *Clark v. Eighth Avenue Railroad*, 32 Barb. 657; *Cayzer v. Taylor*, 10.

Upon the question of liability of banks, it is now clearly held, that if they be acquainted with the facts and circumstances calculated to put a prudent man upon his guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them entirely liable if a loss occur.

It is well that a higher degree of care is demanded by the later decisions than formerly, on the part of those who hold themselves out to the world as depositaries or bailees for hire; and such care and diligence should be equivalent to the character of the thing bailed and the extent of the injury likely to happen in the event of loss.

Under the later decisions, it is left to the province of the jury to determine whether or not the bailee exercised that degree of care or diligence requisite or commensurate, according to the circumstances of the case, and which a reasonable and prudent man would have done under a like state of facts.—*Albany Law Journal*.

## COLONIAL ATTORNEYS.

The substance of the bill to amend the Colonial Attorneys' Relief Act is embraced in the following clause:—

"So much of the Colonial Attorneys' Relief Act as enacts that no person shall be deemed qualified to be admitted as attorney or solicitor under the provisions of the said Act, unless he shall pass an examination to test his fitness and capacity, and shall further make affidavit that he has ceased for the space of twelve calendar months at the least to practice as attorney or solicitor in any Colonial Court of law, and also so much of the said Act and of any orders and regulations made thereunder as relate to such examination, shall not apply to nor shall compliance therewith respectively be required of any person seeking to be admitted as attorney or solicitor under the provisions of the said Act who shall have been in actual practice for the period of seven years at the least as attorney or solicitor in any colony or dependency as to which an order in council has been or may be made as mentioned in the said Act, and who shall have served under articles and passed an examination previously to his admission as attorney and solicitor in any such colony or dependency."

It will be generally admitted that the minimum of restriction should be placed on the admission of colonial lawyers to

practice in England. If the rights of the profession and the interest of the public are protected, that is sufficient. We do not see any objection to the abolition of the examination. A gentleman who has served under articles, who has been examined prior to admission in the colonies, and who has been in practice for upwards of seven years, ought to be deemed duly qualified. If it is suggested that a colonial lawyer may not be posted in English law, we reply that a capable colonial lawyer will speedily become a capable English lawyer; and further, that a gentleman from the colonies is not likely to get much English practice at starting.

But we do see an objection to allowing colonial attorneys to forthwith commence practice in the mother country. If that is done, a colonial attorney who happens to have one or two good appeal cases in England, or who is instructed by a client to realize any estate in England, may say: 'I want a holiday. I will go to England, get admitted, do this business myself, and pocket the costs.' That, we contend, would be unfair to the profession, and contrary to the intent of those who framed the bill. It is not desired that a colonial attorney shall come and be admitted for the purpose of conducting some business he would otherwise have to transact through agents, and then return to the colony. The only way to prevent that is to insist upon an interval between the cessation of practice in the colonies and the admission to practice in England. And we do not think that a less interval than twelve months would suffice. *Law Journal*.

## DISTRESS AND RE-ENTRY.

The progress of civilization may be measured by the extent to which persons are prohibited from taking the law into their own hands. In the infancy of society property and person find their protection in individual force. But, as the reign of law is extended, all rights come to be guarded and obtained through the process of constituted tribunals. In this country there is a singular and unfortunate exception to this golden rule. Owing to circumstances, historical, political, and social, the law of landlord and tenant, so far as concerns the modes in which the landowner can enforce his rights, is still



## DISTRESS AND RE-ENTRY—DR. KENEALY AND GRAY'S INN.

in the barbarous stage. Thus, where forfeiture of a lease has been incurred, the reversioner can re-enter under a proper proviso, without resorting to any legal process, and without the intervention of any officer of the Courts. So also a landlord can himself make a distress for rent in arrear, can in his own proper person enter the house demised, and with his own hands seize any goods or chattels found upon the premises. The evil results of this state of the law are readily discernible and are proved by common experience. Thus we find no less than eight pages in 'Bullen and Leake's Precedents' occupied by forms and notes relating to actions for illegal, excessive and irregular distresses, while the Legislature has over and over again attempted to regulate the levying of distresses. But the case is much stronger when we contemplate the history of the right of re-entry. The ingenuity of conveyancers has been exhausted in framing provisos for re-entry for the purpose of enabling the reversioner to get possession without resorting to an action of ejectment. On paper and in theory of law nothing can be clearer than the right of the landlord upon a forfeiture to enter upon the premises and to remove the tenant therefrom. In practice nothing is more difficult. If, as is generally the case, the insolvent tenant stands his ground and refuses to go, the landlord will enforce his right at his peril. If he hesitates to employ force, the tenant laughs him to scorn. If single-handed he struggles to recover his own, his appearance before a justice of the peace for an assault is not improbable, while the certainty of his defeat in the battle is secured by the foresight of the tenant in garrisoning the house with a party of friends. If the landlord advances to the attack with half a dozen companions, then he is pretty sure to bring himself within 5 Rich. II. stat. 1, sec. 7, and, after having been compelled to attend on two or three occasions at a police court, to find himself indicted at the sessions for a forcible entry. Only last week the magistrate at Great Marlborough Street was occupied in the investigation of the case, in which a re-entry had been followed by a pitched battle between some half-dozen combatants on either side. So fully alive are all lawyers of experience to these perils, that they always advise

the slow remedy of an action of ejectment in preference to a re-entry. Thus a right which was originally designed to help the landlord has in practice proved useless.

In most of the States of the American Union the law, both as regards distress and as regards re-entry, has been amended and placed on a reasonable and satisfactory footing. The landlord to whom rent is due, instead of going himself or sending a broker, obtains a writ of distress at the proper Court, and such writ is executed by the officer of the Court in the ordinary way. Again, a reversioner who seeks to take advantage of a forfeiture, obtains *ex parte* a writ of re-entry from the Court, and if the tenant, upon the officer demanding possession of the demised premises, disputes the right of re-entry, the officer of the Court delivers to the tenant a summons calling upon him peremptorily to show cause at the Court on the following day why the landlord should not have possession. By this method of procedure all dangers of breaches of peace are averted, and at the same time every right which the landlord under our law enjoys is secured to him more effectually. Among the matters which Parliament will be invited to consider next session are the mutual relations of landlords and tenants. And perhaps advantage will be taken of that opportunity to abolish proceedings which benefit neither party to the contract, and which bring about results discreditable to a community which prides itself on its love of order and its hatred of violence.

—*Law Journal.*

## DR. KENEALY AND GRAY'S INN.

When it was first announced that the benchers of the Honorable Society of Gray's Inn had resolved to institute an inquiry into the conduct of Dr. Kenealy as counsel in the case of *Regina v. Castro*, we endeavoured to point out how hazardous was the enterprise which those gentlemen had undertaken. We explained that Dr. Kenealy was not charged with some overt act of dishonor or wrong, but with impropriety in language and demeanour as an advocate in the conduct of a cause. We dismissed, as outside the jurisdiction of the benchers, the charge of attacking the judges, on the ground that the judges were armed with sufficient

## DR. KENEALY AND GRAY'S INN—SHOP-BOOKS AS EVIDENCE OF DEBT.

powers to protect themselves, and that, as their lordships had not thought fit to exercise those powers, it was not the business of other persons to usurp them. Upon the remainder of the case our position was, that the border-line between proper and improper cross-examination, between invective and insolence, between sarcasm and scurrility, proceeding from the mouth of counsel, was altogether indefinite; that forensic liberty and forensic license had never been accurately distinguished; and that the tribunal which was to judge Dr. Kenealy was eminently unfitted to deal with charges of this kind. A month after this expression of our opinion, the report of the committee named by the masters of the bench of Gray's Inn was published, and that report stated that Dr. Kenealy had misconducted himself in various ways in the course of the trial of *Regina v. Castro*. Dr. Kenealy was thereupon ordered to answer the charges, eight in number, preferred against him by the committee. But owing to the illness of the accused the matter was postponed from time to time. Meanwhile, the attention of the benchers was drawn to the newspaper called the *Englishman*, which is avowedly edited by Dr. Kenealy, and on July 8th a notice was sent to Dr. Kenealy to the effect that the bench intended to investigate his conduct as editor of that publication, and to limit their inquiries to that subject. Ultimately, the benchers determined that Dr. Kenealy was the editor of that newspaper, that the newspaper was full of libels of the grossest character, and that Dr. Kenealy, being its editor, was unfit to be a master of the bench of the Honorable Society. His call to the bench was therefore vacated, and he was prohibited from dining in hall. The benchers by another resolution showed that they had not formally abandoned the previous charges against Dr. Kenealy; but they have not pursued them, and it is pretty certain now that they never will pursue them. We see, then, how amply our remarks, made as long ago as last April, upon this matter have been justified by the event. The benchers have not proceeded upon their original indictment; they have not considered Dr. Kenealy's conduct as an advocate in the *Castro* case, and they have not pronounced any opinion thereon. The *Englishman*

happily relieved them from that task, and so saved them from a host of difficulties. The alacrity with which they seized upon this new matter of complaint shows pretty plainly that they had begun to realise their mistake in their former plan of action.

There are probably some hundreds of fanatics who will persistently deny the justice of the sentence pronounced by the bench of Gray's Inn, and who will regard Dr. Kenealy as an injured man. Such persons must be either incapable of understanding plain language, or must be blunted to all sense of what is right. No words that could be employed by a journal having respect for itself, could paint in its true colours the newspaper of which Dr. Kenealy was, and is, the avowed editor. The *Englishman* is declared by the bench of Gray's Inn to be "replete with libels of the grossest character." But the sting of them lies in their authorship. No reasonable man will dispute the proposition that lawyers ought to be the last to bring the law and its chief administrators into popular contempt, to drag it and them into the mire, and to excite the multitude to trample both under the feet of passion and of ignorance. What should be said of a General exciting battalions of private soldiers to mutiny, or leading a mob to sack the palace of his sovereign! The analogy between such a case and that of the editor of the *Englishman* is exact. The benchers have done what they could to express their indignation against a Queen's Counsel defaming all that he ought to hold sacred, and inviting universal rebellion against the law and the judges of the land.—*Law Journal*.

## SHOP-BOOKS AS EVIDENCE OF DEBT.

Last week a correspondent signing himself W. H. H., drew attention to a statute 7 James I. c. 12, intituled "An Acte to avoid the double payment of Debtes," ingenuously confessing that he had never heard of the Act during the service of his articles. Our correspondent proceeded thus:—"It seems to say in effect, that a tradesman's shop-book shall not be evidence of a debt after twelve months from its being contracted. How, then, is a trades-

## SHOP-BOOKS AS EVIDENCE OF DEBT.

man in a disputed case to prove a debt which has been standing on his books more than a twelvemonth after the death of the person to whom the order was given?"

Now we are not quite sure that W. H. H., under a clever pretence of ignorance, was not laying a trap for some unwary reader, possessing himself all the time a clearer insight into the law of evidence than he would have us believe. But at any rate, he has suggested an inquiry of a very curious character, and one perhaps not altogether to be satisfied. However, we will make an attempt at a reply.

We must go further back in legal history than the reign of James I., for we have to commence with 38 Edward III. (A. D. 1363), c. 5, which is quaintly headed thus: "Any man may wage his law against a Londoner's papers," and which is in these words:—"Item come plusours gentz sount grevez et attachez par lour corps en la Citee de Loundres a la poursuite de gentz de meisme la citee surmettantz a eux qu'ils sount dettours et de ceq voillent ils prover par lour papirs la ou ils ne ont fait ne taille est assentu qe chescun soit rescueu a sa lei par gentz sufficeantz de sa condition coudre tieles papirs et preigne le creansour seurtee par autre voie sil vorra sanz mettre la partie de pleder a lenqueste sil ne le voet de son gree." The language of that Act implies that up to that time, among traders in the city, "the papers" of the creditor were held to be conclusive against the debtor.

The next statute is that of 7 James I. c. 12, intituled "An Act to avoid the double payment of Debts." In order to make the matter intelligible we must set out the language of the statute in full:—

"Whereas divers men of trades and handicraftsmen keeping shop-books do demand debts from their customers upon their shop-books long time after the same hath been due, and when, as they have supposed the particulars and certainty of the wares delivered to be forgotten, then either they themselves or their servants have inserte into their said shop-books divers other wares supposed to be delivered to the same parties or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt. And whereas divers of the said tradesmen and handicraftsmen having received all the just debt due upon their said books do oftentimes leave the same books uncrossed or any way discharge, so as the debtors, their executors or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said

wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses of the said payment that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payment. Be it therefore enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop-book as is aforesaid, his or their executors or administrators, shall after the feast of St. Michael the Archangel next coming be allowed, admitted, or received to give his shop-book in evidence in any action for any money due for wares to be hereafter delivered, or for work hereafter to be done above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares or work done, within one year next after the same wares delivered, money due for wares delivered or work done.

"2. Provided always that this Act or anything therein contained shall not extend to any intercourse of traffic, merchandising, buying, selling, or otherwise trading or dealing for wares delivered or to be delivered, money due, or work done or to be done between merchant and merchant, merchant and tradesman, or between tradesman and tradesman for anything directly falling within the circuit or compass of their mutual trades and merchandise; but that for such things only they and every of them shall be in case as if this Act had never been made, anything therein contained to the contrary thereof notwithstanding."

From the first clause of the first section of this Act it seems clear that the framer of the Act thought that as a matter of law a shop-book could be given in evidence, and this supposition is borne out by the exceptive clause, which distinctly permits the books to be given in evidence to prove the consideration of a bill or bond. So also the second purports to leave the then existing law untouched as to dealings between tradesmen and tradesmen in pursuit of their mutual trades. This Act seems to have been continued by subsequent Acts, and remains to this day unrepealed, appearing in its proper place in the authorised edition of the Revised Statutes.

Now in *Pitman v. Maddox*, 2 Salk. 689, Lord Holt referring to the statute as saying that "a shop-book shall not be evidence after the year," &c., boldly declares that it is not of itself evidence within the year. In other words, Lord Holt asserted that the framer of 7 Jac. I. c. 12 took a wrong view of the law, or that the law had been changed by judicial opinion since that time.

Elec. Case.]

LONDON, ELECTION, PETITION.

[Elec. Case.]

Mr. Best, in his valuable work on evidence, says:—"The civil law received the books of tradesmen made, or purporting to be made by them, in the regular course of business, as evidence to prove a debt against a customer or alleged customer," and in a note he further says: "This is the well-known doctrine of civilians, which was implanted by them in most countries of Europe, and at one period seems to have obtained a footing in our own" (7 Jac. I. c. 12), and he proceeds to doubt whether the doctrine could be derived from the Roman Law, inasmuch as it is wholly at variance with the principles laid down in other parts of the *Corpus Juris Civilis*. Mr. Pitt Taylor says without hesitation, that in old times a tradesman's shop-book was admissible in the English Courts as evidence on his behalf.

In the present day the rule is thoroughly established that a tradesman's books are not evidence, but that the tradesman can appear as a witness, and use his books as memoranda to refresh his memory with respect to the goods supplied.—*Law Journal*.

The patent duplex "Law and Collection Bureaus" are entirely outdone by a firm in New York, the receipt of whose circular we have the honor hereby to acknowledge. This ingenious and enterprising association announces its readiness to supply its patrons, not only with every sort of goods, wares and merchandise from a tin whistle to an elephant, but also "to advise in Legal and Mercantile matters of all kinds, and to superintend the settlement of any controversy at law, draw all kinds of legal papers, collect notes, accounts, and claims, and to prosecute or defend suits, if necessary, in all the States and territories." It further announces that it sends general answers to questions in this department without expense. We would commend this "agency" to some of our friends who are in the habit of writing for our "private opinion" on questions of interest to them. *Albany Law Journal*.

## CANADA REPORTS.

## ONTARIO.

## ELECTION CASES.

## LONDON ELECTION PETITION.

GEORGE PRITCHARD, *Petitioner*; JOHN WALKER, *Respondent*.

*Agency—Effect of bribery by Agent—Disqualification of Candidate—36 Vict. cap. 27 sec. 18.*

Evidence of what acts constitute agency considered.

The evidence showed that very extensive bribery and corruption were practised by a very large number of persons and that immense sums of money were expended by the agents of the successful candidate, but no personal acts of corruption were proved against him, and he denied all knowledge of these acts, though he made a very diligent personal canvass. *Quære*, whether it must not be presumed that he was cognizant of the acts of his agents and consenting thereto.

*Quære*, also, as to whether under sec. 18 of 36 Vic., cap. 27, nothing but such personal bribery as would disqualify the candidate would avoid his election, or whether his disqualification was not a necessary consequence of the loss of his seat by corrupt acts on the part of his agents.

[LONDON, Sept. 10, 1874.—HAGARTY, C. J. C. P.]

The petition charged the respondent with bribery and other corrupt practices, both by himself and his agents. The facts disclosed on evidence at the trial sufficiently appear in the judgment of the Chief Justice of the Court of Common Pleas, who having taken time to consider, delivered a written judgment.

*Robinson, Q. C.*, and *Street*, for the petitioner.

*Harriott, Q. C.*, *Magee*, and *Campbell*, for the respondent.

HAGARTY, C. J., C. P.—The evidence has disclosed an enormous amount of bribery and corruption in this constituency.

The number of votes polled for the respondent were about 1,260 and there was direct proof of an expenditure of at least \$9,000 on his side, or an average of over seven dollars for each vote. To this sum may be added various small amounts admitted to have been spent by parties in the course of the canvass.

Apart from the question of responsibility on respondent's part, I am strongly of opinion that there would be sufficient ground for declaring this election void as not being free, but tainted and avoided by wholesale corruption.

It was not attempted to deny the prevalence of bribery, but it was urged that it was committed by persons for whose acts the respondent was not responsible.

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The respondent did not nominate committees, but committees were formed in the different wards by his friends. This was a General or Central Committee.

It is clear that Mr. Dixon, the Secretary of the Reform Association, and also secretary of the respondent's committee, recognized the ward committees and paid moneys to them for expenses of the election, being moneys received from respondent for that purpose, and the expenses of these committees were matters of discussion between him and respondent.

I think there is no doubt in the evidence that many of the persons who admit having given money in bribing were agents of respondent to the extent of making him responsible for their acts, even though such acts were without his knowledge and even against his orders.

In Dr. Hagarty's case he was a committee man, three weeks canvassing; had a canvassing book received from Dixon. Some \$600 passed through his hands, mostly received from Smallman and Reeves, respondent's partners and agents, as I will notice hereafter; received some money from Dixon for the committee of Ward No. 4; paid large sums, such as \$120, for livery stable bills; used to see respondent every day, and talk to him as to how he was getting on, but did not speak to him as to the expenses. I have no doubt of this gentleman being an agent. He deposes to at least nine cases of direct bribery.

H. C. Green also admitted bribery, and would be considered an agent in my judgment. He was an active canvasser, paid rent for rooms, and was, I consider, well known to be working for respondent.

Frederick Fitzgerald was active and canvassing, to respondent's knowledge, and admits several acts of bribery.

John Campbell, a gentleman who had been Mayor of London, and seconded respondent's nomination, was undoubtedly such an agent, and respondent well knew he was working for him. He admitted several distinct acts of bribery, chiefly in giving money to the wives of voters.

Joseph Broadbent was also an agent, in my judgment, and admitted the most distinct acts of bribery of voters.

James Fitzgerald was an active committee-man, and made returns to the Ward Committee. He was foreman to Mr. John Campbell, and admitted paying money to bribe a voter through his wife.

John Doyle was on No. 1 Committee, can-

vassed for respondent, and spent \$91 of Committee money. He admits he offered bribes to several, but found they had been offered more before.

Robert Henderson was Chairman of No. 1 Committee; received \$700 for the ward, and received a small sum, \$50 or \$75, from Dixon for Ward expenses. He admits one distinct act of bribery of a voter through his wife. He also made lavish disbursements in his ward.

George Hiscor was canvassing, I consider, with respondent's knowledge. He admits distinct bribery.

Marvin Knowlton had influence as a temperance man, and went with respondent to canvass votes, and respondent knew, I consider, that he was canvassing for him. He received about \$700, and paid \$500 to one Robinson, a foreman in a large oil refinery, as Robinson said he had much influence with certain voters, and would like to have \$500, and after consulting Reeves he gave him the sum. Robinson spent some of it in bribing, and I consider Mr. Knowlton in this transaction, if not in other reckless payments, acted corruptly.

Wm. J. Thompson was canvassing for respondent, and thinks (as I do) that respondent knew it. He admits several distinct acts of bribery of voters.

John E. Robinson, the man who received the \$500 from Knowlton, and who admits having retained \$200 for himself, in my judgment committed acts of bribery.

Philip Cook was chairman of a Ward Committee. Large sums passed through his hands, and he admits distinct acts of bribery.

John J. Magee, an active canvasser for the respondent, received about \$900, which he paid away to various people for what he calls "election purposes." He would give no definition of his understanding of the "purposes," but it seems impossible to suppose that he could have believed the money was to be spent otherwise than corruptly, and in my opinion he must, on these facts, be assumed to know it was corruptly done.

The very numerous acts of bribery proved with complete distinctness must render it impossible to uphold this election.

I have now to consider the evidence in which it is sought to render the respondent personally responsible. He admits having paid \$1,150 to Mr. Dixon for the expenses that he considered he would be lawfully liable for. There were seven wards; the constituency consisted of several thousand voters, and he and Mr. Dixon

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consulted as to the amount that probably would be required. At first \$1,000 was considered sufficient. Mr. Dixon has given us an account of the expenditure of most of this money. Three hundred dollars went for payments to clerks and messengers. There were eight or ten clerks, and the work ran over nearly all January. Messengers were also employed. Other items were for coal, furniture, rent of rooms; \$100 to a Mr. McDonald, a lawyer, who sometimes acted for Mr. Dixon, and \$600 to \$700 was paid by him to committees in the wards, for their expenses—rent of rooms, light, refreshments, vehicles, driving about, canvassing, &c.

I see no reason to think that respondent or Dixon knowingly applied or intended to apply any of this money to illegal purposes. Respondent further admits having paid to the *Herald* newspaper \$100 for advertising; to the *Free Press*, for same, \$110; and to the *Advertiser*, for advertising and for bills, posters and printing connected with election, \$625. For ornamental canvass cards, \$20.50; stationery and books, \$61.85. Total, \$946.85.

This would leave his admitted expenditure about \$2,100. It was not strongly pressed that such a sum would, under the circumstances, be extravagant, nor am I prepared to hold that it was.

I now turn to another branch of the case affecting the respondent. Large sums of money were proved to have been received from Thomas H. Smallman and George Reeves. They were partners with the respondent in a large oil refining business, called Reeves & Co. The respondent was stated to have been not an active member of the firm. Smallman and Reeves were shown to have taken a very active and prominent part in promoting respondent's return. Reeves is absent, but Smallman was examined. He admitted that between \$5,000 and \$6,000 passed through his hands in the election contest; of this he himself furnished \$1,000. Mr. Edward Harris, a barrister and attorney here, belonged to a legal firm which did business for Reeves & Co., and one of the firm was respondent's own solicitor. Smallman says that he knew Harris was actively interested for respondent, and he thought him the most likely person to go to for money, and he obtained from him \$4,000 in three or four sums. He never promised to repay it, took no receipt, and gave no security. No one suggested his going to Harris. Respondent never mentioned Harris to him. Nothing was elicited from this witness in any way to prove that respondent knew of the

moneys advanced by Harris; or any communication between Smallman and respondent as to election expenses with which Smallman was concerned. He proved that respondent and Harris were intimate. He said he paid:

|                               |         |
|-------------------------------|---------|
| Reeves .....                  | \$1,500 |
| Knowlton.....                 | 500     |
| Dr. Hagarty.....              | 250     |
| F. Fitzgerald.....            | 600     |
| John Campbell.....            | 250     |
| Scandrett .....               | 500     |
| W. J. Thompson.....           | 100     |
| Alderman Magee.....           | 600     |
| Alderman Partridge, jr.,..... | 100     |
| Hiscox.....                   | 50      |
| And spent himself.....        | 150     |

All this money he paid for "election purposes," not asking the parties for what purposes they wanted it.

Mr. George Harris proved the great intimacy between his brother Edward and respondent, and that he told his brother the election could not go on without money. Edward asked how much, and witness said \$5,000 would do. He (witness) said he would give \$1,000, but he has not paid any.

The respondent swears very positively that he had no knowledge whatever of any advance of moneys by Harris; that he never talked of financial matters with Smallman or Reeves, and had no reason to think that either was spending large sums in his behalf. Never talked with Harris about money matters connected with the election; never knew Smallman was in communication with Harris; that it is only within the last fortnight he heard of this payment by Harris; that he warned his friends not to spend money illegally or commit him; that he never treated, fearing to break the law; that he canvassed very diligently, but never heard or knew anything from which he could suspect there was bribery on his side. He had sold stocks to Mr. Harris last fall, on which he still holds \$10,000 of his paper unpaid.

Mr. Edward Harris swears that he paid \$4,000 to Smallman and \$2,000 to Reeves for election expenses. He had a strong feeling of resentment against Mr. Carling and of friendship for respondent. He had never before subscribed to an election beyond \$5 or \$10. On the polling day Reeves got the \$2,000. He did not intend to advance over \$4,000, but he got excited. He was very intimate with respondent; saw him every day during the canvass, but never spoke to him about money then or since the election; does not think respondent knew he had paid

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the money—that he has no claim whatever on respondent for any of this money, and no understanding whatever that he is to be repaid. He says that he never gave a thought how the money was to be expended. He did not go so far in thinking about it as to consider that it would go to buy votes. It was in the atmosphere that much money would be spent on both sides on polling day. Reeves came in and said their opponents were spending two or three dollars to our one dollar, and then he got \$2,000. Only a fortnight ago he mentioned to one of his partners that he had spent this money.

It is impossible to read the evidence without being convinced that this advance of money by Mr. Edward Harris was a most illegal and corrupt proceeding, and I deeply regret that a member of the legal profession should knowingly place in the hands of unscrupulous men a sum like six thousand dollars to be used in debauching and corrupting a constituency. From his purse has been furnished nearly all the money which, in the course of this most startling enquiry, has been proved to have done nearly all the vast amount of mischief and wickedness resulting from extensive bribery.

It is pressed upon me with great force by Mr. Robinson, for the petitioner, that notwithstanding the denials of the witnesses, it is impossible in the very nature of things to doubt: First, That the respondent must have known that bribery was being extensively practised; and secondly, the source from which his partners in business must have obtained the money—that the respondent could possibly have canvassed, as he says, extensively for three weeks without having come across traces of the bribery and of the expenditure of large sums of money.

I need hardly say that I am much impressed by the force of this reasoning, and that it is difficult to see how in the nature of things the bribery and the expenditure could both have remained unknown and unsuspected. Actual ignorance of the prevalence of bribery in this case can only be preserved by a wilful and determined resolution to be and remain ignorant, by a studious and systematic refusal to listen to anything he hears as to the expense of the election, by insisting on the subject being always a forbidden subject of discussion, by shrinking from it and averting the eyes from it whenever it appeared to be coming to the light, and by a tacit if not an express understanding between all the instruments of corruption that the party chiefly interested should be kept ignorant of the wickedness that was being daily practised. I am compelled to conclude

that only by the most rigid adherence to such a stringent system could the respondent be able with literal truth to make the statement of innocence that he has made before me. I am profoundly impressed with a sense of the mischief that may be caused by allowing such a course to be adopted with success, that it must be in effect violating the spirit while keeping outside the letter of the law. I am also well aware that to the understandings of the public at large, for whose benefit and guidance laws are enacted, it is not easy to explain satisfactorily how such a course can be adopted by a candidate for their suffrages, and yet the personal punishment provided by law be escaped. I am not here to deal with the case on moral, but on strictly legal ground; not as I think how the general understanding of intelligent men may regard it, looking at it in its prominent light, but unembarrassed by the heavy sense of responsibility that weighs on one filling my position, a position so forcibly described by the words of a great English Judge: "I cannot imagine to myself a jurisdiction more painful or more responsible than that of a judge deciding without the assistance of a jury that the candidate has been personally guilty of so grievous an offence."

All the circumstantial evidence, all the probabilities of the case, point forcibly to the respondent's knowledge; all the direct testimony that has been brought forward points the other way.

Witness after witness, after describing the days spent in bribery, winds up with the declaration that he never spoke to the respondent on any matter connected with money or with the expenses of the election. The testimony of Harris, Smallman, and of the respondent, declares the latter ignorant of the large payments by the former.

I feel far less difficulty in accepting the respondent's denial of any knowledge of Harris' advances than on the general question of his knowledge of money being illegally spent, without reference to the sources of its supply.

If there were any testimony affirming respondent's knowledge or any balancing of evidence on the subject, I do not think I could accept his direct denial against the powerful pressure of the general facts, to say nothing of the general probabilities of the case. The latter would certainly turn the scale against his assertion.

I can appreciate the embarrassment of a jury where a witness positively declares that he did not see, and was actually ignorant of the occurrence of an event which, according to all human

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probabilities, he must have witnessed, and must have been cognizant of.

In such a case they can perhaps only accept his denial on the assumption that he wilfully shut his eyes and ears and was resolved not to see or hear it. I feel very much in the same embarrassed state. With a larger measure of doubt and hesitation than I remember to have troubled me during a long legal life, I have come to the conclusion not to report the respondent as personally guilty of the abominable and shameless conduct that has disgraced the last election for this city.

I am pleased to remember that this finding, with all other findings, can be reviewed by the Court of which I am a member; and if on the evidence my decision should have been the other way, the learned Judges can so decide.

The Court can decide on the question of fact as readily as the Judge at the trial. There is no contradictory evidence—nothing will depend on the demeanor of the witnesses or their manner of giving their evidence.

An important question may also arise on the meaning of the statute of 1873 governing this election. The 18th section reads as follows:

“No candidate at any election shall, directly or indirectly, employ any means of corruption by giving any sum of money, office, place, employment, gratuity, reward, or any bond, bill or note, or conveyance of land, or any promise of the same; nor shall he, either by himself, or his authorized agent for that purpose, threaten any elector with losing any office, salary, income or advantage, with the intent to corrupt or bribe any elector to vote for such candidate, or to keep back any elector from voting for any other candidate; nor shall he open and support, or cause to be opened and supported at his costs and charges, any house of public entertainment for the accommodation of the electors. And if any representative returned to the House of Commons is proved guilty, before the proper tribunal, of using any of the above means to procure his election, his election shall be thereby declared void, and he shall be incapable of being a candidate, or being elected or returned during that Parliament.”

Mr. Harrison, in speaking to the agency question, argued, as I understood him, that in this section nothing but such personal bribery as would disqualify him could void the election.

I hold that bribery was committed by agents of respondent sufficient to void his election, whether he knew or did not know of their acts.

If I be right in so holding, then perhaps it

may be argued for the petitioner that if, in the words of the section, the respondent “is found guilty of using any of the above means to procure his election,” his election shall “be thereby declared void, and he shall be incapable of being a candidate, or being elected or returned during that Parliament.” In other words, to void the election, I must find that the respondent directly or indirectly employed means of corruption, by giving any sum of money.

If I so find, as I do in the present case, it may be argued that the conclusion is irresistible—that as he is found guilty of using the prohibited means to secure his election, not only is his election to be declared void, but he shall be incapable of being a candidate. The clause draws no distinction as to personal knowledge or assent. It may be, therefore, that the disqualifying must follow the voidance of the election. The Act is peculiarly worded.

The election is set aside, and all the costs must be paid by the respondent. There were the most ample grounds to warrant the petition and the personal charges made against the respondent, and I see no reason for adopting Mr. Harrison's argument that the costs should be apportioned, not all the charges being proved. It was at the suggestion of the Court that petitioner stopped calling further witnesses to prove bribery. I shall report that the respondent was not duly returned, and that the election was void; that no corrupt practice has been proved to have been committed by or with the knowledge or consent of the respondent; that Daniel Hagarty, Henry C. Green, Frederick A. Fitzgerald, John Campbell, Joseph Breadbent, James Fitzgerald, John Doyle, Robert Henderson, George Hiseox, Marvin Knowlton, William J. Thompson, John E. Robinson, Philip Cook, John J. Magee, Thomas M. Smallman, George Reeves and Edward Harris, have been proved in my judgment to have been guilty of corrupt practices, and that corrupt practices have extensively prevailed at this said election.

The trial is now over, and I may venture to hope that these shameful disclosures will prove the death blow to the practice of bribery in this if not in other constituencies. Public opinion will, it is hoped, at last stamp with emphatic disapproval the practice of bribing. The bribes and the bribed should stand on precisely the same footing. Many will, with perfect justice, attribute a far larger blame to men of education and position who tempt the ignorant and the poor to the sin of selling their votes to the highest bidder.

*Election set aside.*



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SOUTH RENFREW ELECTION PETITION.

[Elec. Case.]

## SOUTH RENFREW PETITION.

BANNERMAN, *Petitioner*, v. McDougall, *Respondent*.*Costs—Preliminary Enquiry.*

The respondent sought to establish on an enquiry under a preliminary objection that the petitioner (the opposing candidate) had been guilty of bribery, and was therefore disqualified as such. The enquiry was not concluded, as during its pendency the courts held that bribery would not disqualify a petitioner, but so far as the evidence went it did not show bribery by the petitioner.

*Held*, that the general rule as to costs should prevail, and that the respondent should pay the costs of the enquiry as well as the general costs of the cause.

[*Renfrew*, Sept. 9, 1874.—*Spragge*, C.]

The respondent set up, by way of preliminary objection, that the petitioner had been guilty of bribery, and therefore had no status as a petitioner. Evidence was taken at Brockville, before the Chancellor, in support of this allegation. It however became unnecessary to proceed with the enquiry, as it was held in England, in the *Launceston Case*, that even if bribery were proved against a petitioner he was not disqualified as such.

The trial was then proceeded with before the learned Chancellor, at the town of Renfrew.

*McCarthy*, Q. C., appeared for the petitioner.

*Bethune*, for the respondent.

After the case had been partially heard, the respondent's counsel said that after consulting with his client he had found that there was one case of corrupt practice done by an agent without the knowledge and consent of the respondent, but for which the respondent was responsible to the extent of his seat, and which would avoid the election; but he did not admit any act of personal bribery.

Counsel for petitioner did not wish to press the charges of personal bribery, and would therefore accept Mr. Bethune's proposal.

The learned Chancellor said that the case at present did not show any personal act of corrupt practice on the part of the respondent, but that the question of costs still remained to be settled.

*Bethune*.—As far as the preliminary objection is concerned, there was ground for it and for the enquiry, as it was proved in Brockville, by petitioner's own evidence, that there had been spent of his and his partner's money about \$3,600, making an average of \$6 for each vote cast for petitioner. The Election Court at Toronto have acted on the rule of giving no costs to either party in interlocutory proceedings, as the law was unsettled in this respect. On these grounds he asked that the respondent should be relieved, and that each

party should pay their own costs of the preliminary objection.

*McCarthy*, Q. C., *contra*.—The enquiry at Brockville was not concluded, and it was not known whether the charges against the petitioner were true or false. It would be contrary to every principle to assume the petitioner guilty before the investigation was determined, and in effect to punish him as in the way the respondent asks, by depriving him of his costs. But had the investigation closed, and petitioner's status not been affected, he would, of course, have been entitled to his costs. It was not prosecuted, because the respondent discovered, after setting up the preliminary objection, that as a matter of law, even if true in fact, it was insufficient. It would be an extraordinary result, that a party pleading, as it were, a special defence, which he admitted was bad in law, and which had not been proved in fact, should be relieved from the costs of the proceedings. As to the argument that the practice was unsettled, and that when the preliminary objection was filed that it was supposed, on the authority of the *Galway Case*, to be an omission; according to the *Southampton Case*, 1 O'M. & H., 221 to 225, it appears plain that the successful establishment of a recriminatory case does not debar the petitioner, even when he is the candidate, from prosecuting the petition so far as unseating the sitting member goes, but only prevented the unsuccessful candidate from being seated, and here the seat was not claimed.

*Spragge*, C.—It is conceded by the learned counsel for the respondent, that as to the general costs there is nothing to take the case out of the ordinary rule, that the costs follow the event; but he contends that an exception should be made in regard to the costs of the inquiry which took place upon the preliminary objection of the respondent, that the status of the petitioner was annihilated by reason of his being guilty as was alleged, of personal bribery. It is conceded now that this preliminary objection was untenable as a matter of law, but it is urged that this was an unsettled point when the exception was taken and the enquiry had, and that the evidence showed that there was probable ground for the objection.

The evidence was taken before me, and having the evidence here, and having again read it over, it appears from it certainly that the expenditure of money by the petitioner and his agents was very considerable—so considerable as to leave room for the suspicion that it was not all expended for the legitimate purposes of the election. But what was charged went

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beyond this—it was a charge of personal wrong on the part of the petitioner, which, however, was not established.

There have been cases where the usual rules have been departed from, but these cases, however, are few, and the general rule is now rarely departed from, unless under very exceptional circumstances. In this case, at any rate, they do not appear to apply, and never have been applied to such a case as this.

These costs have been incurred in an inquiry, not upon the merits of the petition, but at the instance of the respondent to intercept an investigation into the merits of the petition on the ground of demerit in the individual by whom the petition was presented, and it is now conceded that the petitioner rightly succeeds.

This is not a case, apart from the question of law, in which a party can properly claim exemption from the general rule. I do not say what might have been the case if a clear case of personal bribery had been made out against the petitioner. It might have been proper to refuse him costs in that case, but such a case has not been made out. The preliminary objection was wrong in point of law. Its purpose to intercept inquiry does not commend it as a proper proceeding, and it was deficient in proof of the fact alleged.

My opinion, therefore, is that these costs should not be excepted from the general costs to be paid by the respondent.

#### MUNICIPAL ELECTION CASE.

GEORGE BOOTH, *Relator*, v. H. M. SUTHERLAND, *Respondent*.

*Disqualification of Candidate by indirect bribery.—Seating of Minority Candidate.—36 Vict., cap. 48, ss., 153, 157.*

The respondent, who had been returned as reeve at a previous election for 1874, upon a trial on a writ of *quo warranto* was found guilty of bribery indirectly, by other persons on his behalf, within the meaning of sec. 153 of 36 Vict. O., cap. 48, and his election was declared void. He was again elected, the relator being the opposing candidate. The relator sought (1), to have the election of the respondent declared void, and (2), to have himself declared to be duly elected.

*Held*, 1. That indirect bribery was within the meaning of sec. 157 of the Act, and that in consequence the respondent was rendered ineligible by the finding at the first trial as a candidate for two years.

2. That the respondent being ineligible, the facts being well known to the electors, all votes given for him were thrown away, and the relator, having the next highest number of votes, was duly elected.

[BARRIE, July, 1874—GOWAN, Co. J.]

This was a *quo warranto* proceeding on the part of the defeated candidate for the Reeve-

ship of the Village of Orillia, to unseat the candidate who received the greater number of votes, on the ground of bribery.

McCarthy, Q. C., for the relator.

W. Lount for the respondent.

The facts of the case sufficiently appear in the judgment of

GOWAN, Co. J. The questions to be determined in this matter are the following :

1. Whether the respondent, H. M. Sutherland, was ineligible as a candidate for the office of Reeve at the time of the municipal election for Orillia, held in June last.

2. Whether George Booth, also a candidate for the same office, who received a less number of votes at the election, was the duly elected candidate.

Eligibility as a candidate for any municipal office in Ontario depends almost entirely on the law relating to our municipal institutions, (see sec. 71, 36 Vict. O., cap 48.) A candidate is disqualified if he has not the qualifications required by the statute under our system of local representative government, but besides the negative disqualifications there are others of a positive character, rendering persons, otherwise eligible, disqualified in express terms. And such disqualifications either relate to the holding of some office or employment deemed incompatible with the duties of a member of a municipal corporation, (see sec. 75), or they are personal disqualifications, the result of some act of a criminal nature declared to be a ground of exclusion, (s. g. sec. 157.)

The offence of bribery, striking as it does at the root of freedom and purity of elections, one might well expect to find in every well-considered system of local representative government, and in ours it is not merely prohibited in all its various phases and details, but the Legislature has inflicted temporary disqualification as a punishment for the offence.

It is charged in the case before me that the respondent was disqualified because he had been found guilty of bribery upon a trial upon a writ of *quo warranto* at an election during this present year, which was declared void, and the relator removed from office on that ground.

The 153rd sec. of the stat. enacts,—“The following persons shall be deemed guilty of bribery and shall be punished accordingly,” (that is as provided in the Act). The sub-sections of the clause, under seven distinct heads, mention and describe in elaborate detail, acts, the doing of any

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of which by any person brings him within the provision, and subjects him to the penalties of bribery, as here defined, on being found guilty of the offence.

The first sub-section, so far as touches this case, may be shortly read as follows:—Every person who shall directly or indirectly, by himself or by another person on his behalf, give, &c. any money, &c., in order to induce any voter to vote at a municipal election, &c. shall be deemed guilty of bribery.

The second and third sub-secs. relate to other acts to influence voters, the 4th to the act of advancing money for bribery, the 5th and 6th to voters corruptly receiving money, and the 7th to hiring teams to convey voters to the polls, &c.; these last acts are innocent in themselves, but, like the acts mentioned in the other sub-sections, persons committing them are to be deemed guilty of bribery and punished accordingly.

In the case of a candidate, one of the punishments is ineligibility as a candidate for any municipal election for two years. Sec. 157 enacts that "any candidate elected at any municipal election who shall be found guilty by the Judge, upon any trial upon a writ of *quo warranto*, of any act of bribery or of using undue influence as aforesaid, shall forfeit his seat and shall be rendered ineligible as a candidate at any municipal election for two years thereafter."

An act of bribery, &c. must be found by the proper tribunal upon a writ of *quo warranto*. What is bribery we find by reference to the 153 sec. And any one of the acts mentioned in any one of the sub-sections, committed by a person (either directly or indirectly by the person himself or some other person on his behalf under sub-section 1 and 2) constitutes an act of bribery within the meaning of the law. Two consequences are here mentioned on a finding of guilty, one necessary and immediate,—the forfeiture of the candidate's seat, the other a positive disqualification as a candidate for a limited time,—both may be said to be in the way of punishment upon the offender for one and the same offence, an act of bribery. If the words "an act of bribery" meant only an act done by the party himself personally, it would follow that an act of bribery committed indirectly by another person, on the candidate's behalf, would not forfeit the candidate's seat, and it is obvious that such a construction would render nugatory a very express provision of the law, for the sum of both—the forfeiture of the seat of the candidate and the disqualification for two years—is

the measure of punishment prescribed by this clause. The words in sec. 157 seem to me to cover any act directly or indirectly committed by a candidate which is declared to be bribery by the 153 sec.

It may be that the provision of law is a hard one, and it may no doubt work harshly in some cases, but with that I have nothing to do where the intention of the Legislature is plain.

The provisions 161 and 162 are in keeping with this view, and seem to me pointed in the case of candidates to secure notice of the candidate's disqualifications in the particular municipality. The finding is a matter affecting a candidate very seriously, but the provisions of the 156th sec. secure for a party charged with an offence under 153, as well as the 154th sec. a public and open trial by *viva voce* evidence, taken before the judge, upon which his judgment is to be founded; whereas the general mode of trial in controverted elections is upon statement and answer by affidavit in a summary way. In other words, the party charged with an offence under sec. 153 has as full opportunities for defence, and at least as good a tribunal, as a party charged with crime on indictment found.

The respondent offered himself for election as Reeve of Orillia last month, and was returned as elected, having received a larger number of votes than the relator, who was the only opposing candidate. The respondent's disqualification or ineligibility as a candidate is alleged to be in substance that he was found guilty of bribery within the meaning of sec. 153 upon the trial during this present year of a writ of *quo warranto*, before the officiating Judge of the County Court of this County, and his seat being forfeited, he was, by order of the Judge, removed from his office as Reeve. And the evidence before me shows that such was the fact. The affidavits fully detail the circumstance, and an exemplified copy of the judgment roll is put in in proof of the disqualification of the respondent. The particular finding bearing upon this is as follows:—

"Third, that the said respondent was a candidate elected at the municipal election mentioned in the said writ of summons and papers, and that he, the said respondent, was guilty of bribery within the meaning of sec. 153 of the Municipal Institution Act of 1873, (36 Vict. chap. 48), at the said election, that is to say, in that the said respondent did indirectly, by other persons on his behalf, give money to voters in order to induce them to vote for him, the said respondent, at the said

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"municipal election." This adjudication seems to me clearly to show the fact alleged, and with all the particulars necessary to a finding under sec. 153, and supports the relator's allegation respecting the respondent's disqualification. It is not necessary in a formal judgment to enter into details, and the maxim, *Omnia presumuntur rite esse acta* applies to all acts of a judicial character. And after verdict, whether in civil or criminal cases, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved though they were not distinctly alleged in the record, provided it contains terms sufficiently general to comprehend them in reasonable intentment: *Regina v. Webb*, 1 Den. 338; *Regina v. Waters*, ib. 356; *Goldthorp v. Hardman*, 13 M. & W. 377; *Kidgell v. Moore*, 9 C. B. 364. But I do not think the judgment needs such aid.

At the last argument of this case, it was stated as an objection that the enquiry here should be *visa voce* under sec. 156. I do not think it necessary or required by the statute; the respondent simply appears and offers no evidence, nor does he deny the matters of fact that a trial was had, and the finding in question by the judge. This is not a trial whether the party has been guilty of bribery at this past election, but whether he is disqualified and the proof of that is found in the judgment and papers before me; it is a question simply of a previous conviction, so to speak.

My finding on the first question then is, that the respondent was ineligible as a candidate for the office of Reeve at the time of the last municipal election for Reeve at Orillia in June last, he, the respondent, having been found guilty of an act of bribery bringing him within the disqualification mentioned in the 157th sec. of the Act within a few months previously.

Now as to the second question, whether George Booth, who received a less number of votes at the election, should be declared elected.

As I collect the rule of law from the authorities it is,—If an election is made of a person who is ineligible, that is, incapable of being elected, the election of such person is absolutely void, even if he is voted for at same time with others who are eligible; and if the electors have notice of the disqualification of a candidate, every vote given for him afterwards will be thrown away as not having been given at all: *Rex v. Hawkins*, 10 East 211, *Claridge v. Evelyn* 5 B. & Al. 81; *Rex v. Bridge*, 1 M. & S. 78; *Rex v. Parry*, 14 East 549. And the effect of this is, not only will

the election of a disqualified person be held void, but if it takes place after notice of disqualification is given the electors, the candidate having the next highest number of votes will be elected. (Rodgers on Elections 224.)

The doctrine, however hard it seems, is founded on the familiar principle that every man is bound to know the law with reference to any act which he undertakes to do, and consequently that when an elector is apprised of the fact of disqualification of a candidate, and notwithstanding gives his vote for him, the elector takes upon himself the risk of losing his vote if his view of the law is wrong. (Rodgers on Elections, 226.)

Here there were only two candidates.

All the cases cited are quite distinguishable from the facts before me in this matter, and it is difficult to conceive a case in which the ineligibility of a party as a candidate could have been brought more prominently before the electors than in the present. The proofs before me show that in March and April the trial was had, at which the respondent was pronounced guilty of bribery; that a number of voters were examined thereat, and after the decision the matter was generally and publicly known; that it was discussed in the local papers; that at the nomination it was publicly stated by the relator that the respondent was disqualified for the office of Reeve by reason of his having been found guilty of bribery, and that he was ineligible for the said office; that on the second day thereafter (the next day was a Sunday) public notice was given in printed form and distributed over the village, informing the electors and warning them that their votes would be thrown away; so that before, at, and immediately after the nomination the electors appeared to have had the fullest notice of the respondent's disqualification. And all the facts would seem to show that the relator was quite justified in his statement—"I do not believe that there was an elector of the village of Orillia who did not know that the election of the said Sutherland had been declared invalid and void on the ground of bribery by him or his supporters." I find that the electors had full notice of the respondent's disqualification as a candidate, and the votes for him being thrown away, that the relator, a qualified candidate, is entitled to the seat.

A formal adjudication can be drawn up to give effect to my finding in favor of the relator, who is entitled to his costs to be taxed, and the necessary process will issue under the statute.

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DONOGHUE v. THE CITY OF CHICAGO.

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## UNITED STATES REPORTS.

## SUPREME COURT OF ILLINOIS.

## DONOGHUE v. THE CITY OF CHICAGO.

*Dower—Allowance in lieu of—When cannot be changed.*

When a widow has petitioned to recover dower, and by reason of the indivisibility of the property an allowance has been made to her in lieu of dower, the sum so fixed becomes conclusive, and cannot be changed by a court of equity, although the property may subsequently become greatly enhanced or depreciated in value.

Appeal from Cook County.

Opinion of the Court by SOOTT, J.

The question involved in this case is, whether when a widow has petitioned to recover dower, and by reason of the indivisibility of the property an allowance has been made to her in lieu of dower, the sum so fixed becomes conclusive and cannot be changed by a court of equity, although the property may subsequently become greatly enhanced or depreciated in value.

The facts alleged in the bill and admitted by the demurrer are briefly these :

On the 3rd day of October, 1860, the appellant filed her petition in the Circuit Court of Cook County, for dower in certain premises against Joseph N. Barker and the City of Chicago, and upon the hearing she was found to be entitled to dower, and thereupon commissioners were appointed by the court to assign dower under the statute, who, at a subsequent term of the court, reported that the premises could not be divided nor dower assigned without manifest injury to the rights of the parties interested therein. Upon the confirmation of the report a jury was called, and assessed the yearly value of the dower in the premises at the sum of seventy-five dollars per annum, and the court decreed the payment of that sum and a like sum annually in lieu of dower, during the natural life of the doweress.

Since the rendition of the decree in the former proceedings, the property has greatly risen in value, so that the sum of seventy-five dollars per annum is grossly inadequate as an allowance for dower therein, the premises being worth the sum of thirty thousand dollars, without any improvements, and would readily rent unimproved, for a term of years, for at least fifteen hundred dollars, and that sum is the present fair rental value.

Our statute follows the common law, and declares that "a widow shall be endowed of the third part of all the land whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless the same shall have been released in legal form." It is also provided that wherever it is practical to do so, that the dower shall "be set off and allotted to the widow by metes and bounds, according to quality and quantity."

In view of this fact that some estates could not be divided without great detriment to the rights of the parties interested, in case of a division, giving to the widow a portion too small for profitable use, the legislature, to make provision whereby the widow should receive the benefit of her right and the estate should not be rendered valueless by an unwise division, enacted the 28th section of the chapter on dower, in which it is provided that when "the land or other estate is not susceptible of a division without great injury thereto, a jury shall be empanelled to inquire of the yearly value of the widow's dower therein, and shall assess the same accordingly, and the court shall thereupon render a judgment that there be paid to such widow, as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower, and the like sum on the same day in every year thereafter during her natural life." The policy of the common law was, doubtless, that the dower should be assigned by "metes and bounds" one-third of the estate itself. Much trouble arose out of the difficulty, in some estates, of making an equitable division of the property, so that the same could be enjoyed by the doweress and the heir.

Obviously, to avoid the practical difficulties in the way of assigning dower by "metes and bounds" in certain estates too limited in extent to be profitably divided, the statute above referred to was enacted.

The power of the legislature to make such a provision for the maintenance of the widow in lieu of dower at common law, cannot be questioned; indeed the right of dower might be abolished by legislative power if deemed expedient, and other more beneficent provision made.

The effect of the statute is, where lands are found to be indivisible, and the yearly value of the dower is assessed in the mode prescribed that such assessment, by force of the statute stands in lieu of dower, and the heir or the owner of the fee will take the estate discharged from dower, but instead thereof, burdened with

U. S. Rep.] DONOGHUE V. THE CITY OF CHICAGO—MORTON V. NOBLE. [U. S. Rep.]

a certain annuity, during the natural life of the widow.

Such is the plain meaning of the law, and if it works hardship in certain cases, only the power that enacted it can afford the remedy.

It is not in the power of a court of equity to relieve against the force of a statute, the meaning of which is not doubtful.

In the case under consideration, the yearly value of the dower was fixed by the decree of the court some ten years ago, and the aid of a court of equity is now invoked to relieve against the effect of that decree, on the ground that since the former proceedings were had, by reason of the enhanced rental value of the premises, the yearly value of the dower as then fixed by the court, is grossly inadequate.

It is not pretended how a court of equity will obtain jurisdiction to afford the relief sought.

The grounds of equitable jurisdiction are usually fraud, accident or mistake. None of these elements are to be found in the case under consideration. It is not pretended that the decree was not fairly pronounced, or that the value of the dower was not then fairly assessed. Had the assessment been unfairly obtained, or for an inadequate amount, the widow would at that time have been permitted to contest it, and would have been entitled to have a re-assessment. Not having done so, we will presume that the assessment was fairly obtained, and for the proper amount.

It is not doubtful that at common law, if the sheriff was guilty of fraud in making the assignment of dower, equity would relieve either party and order a re-admeasurement of dower. To this effect are the cases, *Hoby v. Hoby*, 1 Ves., 218; *Sneyd v. Sneyd*, 1 Atk., p. 442. It is believed that no case can be found where a court of equity ordered a re-assignment of dower unless where the bill charged fraud or mistake. Relief has been granted where the title to the lands assigned to the widow or heirs had failed after assignment, and a re-assignment ordered, as in the case of the *Singleton heirs*, 5 Dana, 87.

We have not been referred to a single case that holds the contrary doctrine. The questions involved in the case of *Grove v. Cothor*, 23 Ill., 634, cited by counsel, are not analogous to the one we are considering, and the reasoning of the court will not be considered as controlling the decision of this case.

In this instance it was found that the appellant could not have dower assigned to her by "metes and bounds," and by the decision of the court she got all that the law provided she

should have in "lieu of dower," and there being no fraud or mistake charged in the proceedings, there is no ground for equitable relief, and the decree of the Circuit Court is affirmed.—*Chicago Legal News*.

#### MORTON V. NOBLE.

*Effect of release of dower when deed from husband and wife becomes inoperative as to husband's estate.*

1. WHEN DOWER NOT BARRED BY.—That when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the dower is not barred by the deed.

2. WHEN DOWER CANNOT BE RESTORED.—That the court has been referred to no case that holds, where the husband and wife conveyed a perfect and indefeasible title, and when the title was subsequently lost, solely by the fault and neglect of the grantee, that the dower would be restored.

3. WHEN THE RIGHT OF DOWER IS BARRED.—*Held*, where the title to land was in the husband, and the wife joined him in a deed thereof and released her dower, and the grantee omitted to place his deed upon record, and a creditor of the husband obtained a judgment against him and sold the land upon an execution issued upon such judgment, and the purchaser in due time received a sheriff's deed, that the right of dower of the wife was forever barred.

Appeal from the Superior Court of Chicago.

Opinion by SCOTT, J.

The appellee, by proof of her marriage with Noble, his death and seizin of her husband during coverture, having made out a *prima facie* case entitling her to dower, the question arises whether the defence set up by the appellants is sufficient in law to bar her dower.

From the stipulation as to the facts, it appears that Mark Noble, the husband of the appellee, was seized in fee simple of the land in which dower is claimed, and that on the 7th day of October, 1836, he and his wife, the appellee, duly made, executed, and both acknowledged in due form of law, a deed conveying the title in fee simple to Benjamin Harris, which deed was duly delivered to Harris on the same day, but was not recorded until the 31st day of August, 1837. After the making and delivery of the deed to Harris, but before the same was recorded, one Jefferson Gardner recovered a judgment in the municipal court of Chicago, against Mark Noble, for the sum of two hundred and fifty-one 56-100 dollars, which judgment became a lien on real estate on the 7th day of July, 1837. At the date of the conveyance to Harris the land was vacant and unoccupied, and such proceedings were subsequently had that the

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premises were sold on an execution issued on the Gardner judgment, and Harris failing to redeem, the title matured in the purchaser at that sale, and the appellants now claim title through certain *mesne* conveyances as the grantees of the purchaser.

Mark Noble died in 1863, intestate, and the appellee filed her petition claiming dower in the premises. It is not questioned that the deed of July 7, 1836, was sufficient to release the right of dower if the title had remained in Harris, but it is insisted that inasmuch as the title was defeated in Harris, by reason of the sale on the Gardner execution, that the dower is not barred, and the appellants not connecting themselves with or claiming under the Harris title, cannot set up the release of dower to him to defeat the demandant in the proceeding. It will be observed that Harris obtained a perfect title to the land free from all incumbrances. The title thus acquired remained in him for the period of about one year, and was only defeated by the laches of Harris in not complying with the registry laws of this State, and by no fault or neglect of the grantor, Noble.

We fully recognize the doctrine that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, or by reason of any wrongful act on the part of the husband, the dower is not barred by the deed. *Blaine v. Harrison*, 11 Ill., 384; *Summers v. Babb*, 13 Ill., 483; *Grove v. Cother*, 23 Ill., 634; *Stribling v. Ross*, 16 Ill., 122. This case does not fall within the rule announced in any of the former decisions of this court. We have been referred to no case that holds that, where the husband and wife conveyed a perfect and indefeasible title, and where the title was subsequently lost, solely by the fault and neglect of the grantee, that the dower would be restored.

It is difficult to comprehend upon what principle such a doctrine could be maintained. The doctrine of the cases cited above rests upon sound reason. In case the title does not pass by the deed of the husband and wife, the dower will not, and hence the grantee takes nothing.

It is a familiar principle that a widow cannot release her right of dower to a stranger to the title, but in this instance the release was to the owner of the fee, and for that reason it was effectual. Harris was in no sense a stranger. By the deed from the demandant and her husband he became vested with an absolute and

indefeasible estate in the land. The title never failed. It was lost simply by the laches of the grantee. There are many ways in which Harris, by mere neglect, could have allowed the title to pass from him. The land being vacant and unoccupied, he might have suffered a party to make an entry and hold possession for twenty years, until the right of possession had matured into an absolute title against him. Had the title been lost in this way, it would hardly be insisted that the demandant in this case would be entitled to dower in the premises simply by reason of the failure of Harris to assert his rights within the period fixed by the statute of limitations. It is insisted that Harris was not seized of the land as against the creditors of Noble for the reason that the deed was not recorded in apt time. That was no concern of the grantor. It was not in his power to compel the grantee to place his deed on record. It does not appear that there were any creditors of Noble at the date of the conveyance. If the grantee chose to withhold his deed from record the grantor could not prevent it. But it is not true that Harris was not seized of the land as against the creditors of Noble. He was in fact seized of an absolute title as against all the world, and held it for the period of one year, and might have continued to hold it forever, except for his own laches in not complying with the registry laws of the State.

We are of opinion, therefore, that the deed to Harris was effectual to pass the right of dower, and the title never having failed or been defeated by reason of any prior lien or incumbrance, or any act on the part of the grantor, the right of dower is forever barred.

For the reasons indicated, the decree of the Superior Court is reversed and the cause remanded.—*Chicago Legal News*.

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THE MARRIED WOMEN'S PROPERTY ACT OF ONTARIO, with notes of the English and Canadian cases, and observations respecting the interests of husbands in the property of their wives; with an appendix containing the earlier Statutes relating to conveyances by married women. By R. T. Walkem, Barrister-at-Law, author of "A Treatise on the Law of Wills." Toronto: Willing and Williamson, 1874.

Though this little book contains less than one hundred pages, it will be found

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of more practical use than many more pretentious volumes. The author does not assume to express any decided opinions upon the multitude of doubtful points that have arisen and are likely to arise under these troublesome Acts, but whilst drawing attention to many of them he offers suggestions which will be very useful in the present transition state of this branch of the law.

It cannot be denied that the Courts have been astute to interpret the acts with reference to the principles and policy of the common law rather than with what may fairly be assumed to have been the intention of the framers of some of these acts. For example, it is difficult to believe that it was intended that a husband should have the power of turning his wife out of doors, and deprive her of her clothes and other chattel property acquired by her previous to her marriage, when we find that one statute says she "shall have, hold and enjoy it free from her husband's control or disposition, without his consent, in as full and ample a manner as if she remained unmarried," and when another says that she may maintain an action in her own name for any separate property "against any person whomsoever, as if such property belonged to her as an unmarried woman." It would seem difficult by any form of words to make her position stronger even against her husband. But yet *McGuire v. McGuire*, 23 U. C. C. P. 123, decides that she is merely *protected* in the *possession and enjoyment* of her personal property without giving her the right to *dispose* of it, though what her "possession and enjoyment" would be worth if she were locked out of the house (possibly her own as well as the furniture in it) by a drunken or cross-grained husband, it is difficult to see. Such a case has actually occurred, and the law was powerless to give the wife even her own personal clothing. Mr. Walkem says the words of the latter statute are sufficiently ample to justify a civil or criminal proceeding (by the wife) against the husband; but Mr. Justice Gwynne, in *McGuire v. McGuire*, limits the right of action by the wife against the husband to property held *for* her (i. e., by others, not her husband, and not in his possession), and not *by* her, (and therefore in

one sense in the possession of the husband). This interpretation manifestly renders that part of the statute practically inoperative in the mass of cases where a wrong was probably intended to be remedied. This is a matter which can scarcely fail to come before the Courts for fuller discussion and more final adjudication.

We are not at present concerned to discuss the policy of recent legislation on marital relations, and Mr. Walkem may be right when he says in his preface—"It is conceived, however, that these objectors have underrated or lost sight of the restraining power of that natural law to which they refer, and have not sufficiently estimated the tact and capacity of the gentler sex; and it will probably be found in practice that the privileges conferred upon wives by the Act will seldom be abused, and will be used only as a shield against oppression or injustice." But however this may be, we are certainly not at the end of litigation on this subject, and our author's work will be most acceptable, not only because all the light that can be had is wanted, but because the work which he proposed to himself to do has been done in a very satisfactory manner. The book is neatly got up, and is very creditable to the enterprising firm who publish it.

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SELF-PREPARATION FOR THE FINAL EXAMINATION, containing a complete course of study, with statutes, cases and questions, and intended for the use, during the last four months, of those articulated clerks who read by themselves. By John Indemauro, Solicitor, Clifford's Inn, Prizeman Michaelmas Term, 1872, author of *Epitomes of Leading Common Law and Equity, and Conveyancing Cases*. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1874.

Mr. Indemauro appears to be of a practical turn of mind. We have had occasion favorably to notice his *Epitome of Leading Common Law, Equity and Conveyancing Cases*. Not long since we had the pleasure of noticing the second edition of his *Epitome of Common Law*



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Cases. He reads with students; but many students are unable to avail themselves of the services of a tutor, and for all such the present work is intended. It appears to contain a careful selection of conveyancing, common law, equity, bankruptcy and criminal law books, with the statutes and cases affecting the same. One good feature of the work is that too much is neither undertaken nor recommended. Some guides for law students are so elaborate as to demand the study of a life-time to master a fair share of them; and then the student remembers rather what he has not done than what he has done. This is no such guide. It is simple, concise and practical. We should like to see a similar work prepared for use in Ontario. Some one of our young lawyers might, we think, prepare such a work, with advantage to the profession and profit to himself.

A TREATISE ON THE DOCTRINE OF ULTRA VIRES. BEING AN INVESTIGATION OF THE PRINCIPLES WHICH LIMIT THE CAPACITIES, POWERS AND LIABILITIES OF CORPORATIONS, AND MORE ESPECIALLY OF JOINT STOCK COMPANIES. By Seward Brice, M.A., LL.D., London, of the Newer Temple, Barrister-at-Law, London: Stevens & Kayne's, Law Publishers, Bell Yard, Temple Bar, 1874.

It is sometimes most difficult to observe the line between legislation and interpretation of law. The line is at times so thin and shadowy that it cannot be discovered except with great effort. The expansion of law and growth of what is commonly called judge-made law, is in modern times a subject not only for contemplation, but for wonder. No better illustration can be found than that of the doctrine of *ultra vires*.

Mr. Brice, in his preface, truly says: "Its appearance as a distinct fact, and as a guiding or rather misleading principle in the legal system of this country, dates from about the year 1845, being first prominently mentioned in the cases in equity of *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, and at law of *East Anglesa Railway Co. v. Eastern Counties Railway Co.*, 11 C. B., 775." He mentions that it was purely the creature of judicial decision. He says, "It was

originated by the Courts *proprio motu* upon grounds of public policy and commercial necessity, and to meet and provide for circumstances which called for the intervention of some strong hand, but for which the State had not directly provided. Being so originated, and as most will probably admit, wisely originated, and in the best interests of trade and commerce, it has, however, become a species of Frankenstein. The tribunals have created, but they have confessed themselves powerless to control the operations of the principle which they have called into existence, or even to systematize its effects."

In the preface, Mr. Brice gives an amusing description of the vagaries of this judge-made Frankenstein. He knows that, notwithstanding the time-honored legal maxim that a man cannot stultify himself, a corporation may set up its incapacity whenever it is inconvenient for it to carry out its engagements; that notwithstanding the maxim in Equity, that he who seeks equity must do equity, a corporation may be relieved from a contract on the ground that it is *ultra vires*, and yet keep the benefit thereof. He also points out that Courts of Law and Equity are confused in their treatment of the confounded creation. "*Ultra vires*," he says, "objected to the restraint imposed by the maxim '*qui facit per aliam facit per se*,' and made a desperate stand to be relieved from it. Here, however, the Common Law maintained its supremacy: *Berwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, though, *mirabile dictu*, Equity yielded: *Mizer's Case*, 4 De. G. & J. 575, 586. So that there is now seen the strange anomaly that corporations may be liable at law under circumstances where Chancery imposes no liability, and that what the former says is palpable fraud the latter will often pass over, or at least admit its inability to punish."

And this is not the worst he has to say of the monster that he has undertaken to describe. He points out that the same courts, dealing with it at different times, from causes not easily understood, have not been guided by uniformity of decision or indecision. "It is, he says, *ultra vires* of the Great Eastern Railway to run steam packets from Harwich: *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, but

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not of the South Wales Railway Company to run them from Milford Haven: *South Wales R. Co. v. Redmond* 10 C. B. N. S. 675. It is *ultra vires* of a steamship company to sell the whole of its vessels except two: *Gregory v. Patchett*, 33 Beav. 547, but perfectly legal thus to dispose at one swoop of every one of them: *Wilson v. Miers*, 10 C. B. N. S. 348. It is *ultra vires* of the town of Southampton: *Attorney General v. Andrews*, 2 Mac. & G. 225, or Sheffield: *Reg. v. Mayor of Sheffield*, L. R. 6 Q. B. 652, to incur expense in order to obtain a proper supply of water for their respective inhabitants, but not so for Ashton-under-Lyne; *Bateman v. Ashton-under-Lyne*, 3 H. & N. 323, or Wigan: *Attorney General v. Mayor of Wigan*, 35 De G. Mc. N. & G. 52.

It was at one time supposed that a corporation was an artificial person, having all the powers as far as applicable of a natural person. Had this idea been allowed to prevail there would not have been much room for the doctrine of *ultra vires*. But when it is considered that nearly all corporations exist for the attainment of certain objects only, it is only proper that their powers should be restricted to the objects for which they were created; and it this consideration which gave birth to the doctrine of *ultra vires*.

An examination of the many dicta and decisions to which he refers we think quite justifies him in the remarks which he has made in the preface to his work, and in the conclusion that "the decisions and dicta are very conflicting, and some absolutely irreconcilable, while the principle itself is become, if not an excrescence upon, at least a very disturbing element in the legal system." He might have added, without exaggeration, that *ultra vires* is a Will o' the Wisp in the broad field known as the glorious uncertainty of the law.

Much as one may be surprised at the confusion which clouds this doctrine, it is all the more pleasant to notice the lucid manner in which it has been handled by the author. His arrangement of the work is logical and his treatment of the parts clear and concise. The work is arranged under four main heads, that is to say,

Part I. An introduction, showing the legal status of corporations, the ordinary incidents of corporations, varieties of corporations, and how corporations are created.

Part II. The doctrine of *ultra vires* as affecting the business and other transactions engaged in by corporations, and their rights and liabilities in respect thereof.

Part III. The doctrine of *ultra vires* considered with reference to the powers and privileges of corporations, and the manner and purposes in and for which such may be employed.

Part IV. The rights and liabilities of persons concerned in or otherwise affected by transactions considered to be *ultra vires*, and the legal proceedings which may be taken in respect thereof.

Each part appears to be well and appropriately filled up. The references to decided cases are full and accurate. The result is a body of law essential as an appendix to any work on corporations that has hitherto been published. The index of cases and index of subjects are full and complete—the whole making a volume of about 600 pages, well printed and well bound, and such as should be on the shelves of any lawyer who assume to have a useful and reliable library of modern law.

A TREATISE UPON THE LAW OF EXTRADITION, WITH THE CONVENTIONS UPON THE SUBJECT EXISTING BETWEEN ENGLAND AND FOREIGN NATIONS, AND THE CASES DECIDED THEREON. By Edward Clarke, of Lincoln's Inn, Barrister-at-Law, and late Tancred Student. Second edition. London: Stevens & Haynes. Toronto: R. Carswell.

Extradition of criminals is now looked upon by most civilized nations as an international duty. In this respect treaties are made and laws passed for the efficient performance of the duty, and of late years, owing to the facilities for passenger transit, many cases have arisen calling for judicial exposition of the treaties so made and the laws so passed. The consequence has been the rapid growth of that branch of the law now generally known as the Law of Extradition.

Until 1866 the only English book expressly devoted to this branch of the law

## REVIEWS—NEW RULES.

was a pamphlet published in 1846 by Mr. Charles Egan. In 1866 Mr. Clarke, the author of the book now before us, having been engaged in England on several important extradition cases, had his attention directed to the want of a good text book on the subject, and was induced to supply the want. The result was the first edition of the work now under review. It was received with great favor in England, the United States and Canada, and was soon exhausted. The author was thereupon induced to supply a second edition of his work.

We have looked through this second edition with much interest, and were particularly pleased with the fulness and completeness of the work. It is as much a Canadian as an English work. His history of the law in Canada evinces a remarkable knowledge of the Canadian decisions. *Okah Tubbee's case*, *Anderson's case*, the *St. Albans case*, *Burley's case*, *Asher Warner's case*, *Morton's case*, the *Lamirande case*, and all other Canadian leading cases, as reprinted in the columns of this journal, are carefully digested. The author is equally industrious and equally happy in his exposition of the Extradition Law in the United States. His review of *Chevalier de Longchamp's case*, *Robbins' case*, *Daniel Washburn's case*, *Kaine's cases*, and other leading United States decisions, is all that can be desired. His exposition of the law in England and France is, we presume, equally satisfactory.

The remainder of the treatise is occupied with the practice of the Law of Extradition in the several countries we have named.

In an appendix will be found the conventions of 1843 and 1852 between Great Britain and France, the conventions of 1862 and 1872 between Great Britain and Denmark, the convention of 1872 between Great Britain and Germany, the convention of 1872 between Great Britain and Belgium, the convention of 1873 between Great Britain and Italy, the convention of 1872 between Great Britain and Brazil, the convention of 1873 between Great Britain and Sweden, and the convention of 1873 between Great Britain and Austria. There are besides, in the appendix, a note upon the *Lamirande case* and a note upon political offences.

The author has done much to make well known this new and interesting branch of law. He has spared no pains to bring within the reach of each purchaser of his book all the law that appertains to the subject in Great Britain, the United States, France and Canada. We can bear special testimony to the accuracy of his book so far as the law of Canada is concerned, and we have only to ask, in conclusion, that our Canadian lawyers will, without hesitation, extend to the work that patronage which its merits deserve.

## NEW RULES.

## IN THE COURT OF QUEEN'S BENCH AND COMMON PLEAS.

## TRINITY TERM—38th Victoria.

The following are the Rules regulating the practice under the provisions of the Administration of Justice Act, 1874.

*Saturday, 5th September, A. D. 1874.*

It is ordered, That the following Rules shall come and be in force in the Courts of Queen's Bench and Common Pleas from and after the last day of this present Trinity Term:—

1. As the business to be transacted out of Term does not appear to require more than one Judge of the Courts of Common Law to sit in open Court every week, it is ordered that one of the Judges of the Superior Courts of Common Law shall sit in open Court in Osgoode Hall, out of Term, pursuant to the Administration of Justice Act of 1874, every week, for the purpose of disposing of all Court business which may be transacted by a single Judge; and such sittings shall be on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

2. All Rules directed to be issued out of Term shall be four day Rules, and shall be heard at the first sitting of the Judge in open Court for arguments after the same are returnable, unless otherwise ordered.

3. Demurrers shall be set down at least four days before the day on which they are to be heard, and notice given to the opposite party.

## CORRESPONDENCE—FLOTSAM AND JETSAM.

4. A Demurrer Book shall be left with the Clerk of the Crown and Pleas of the Court in which the cause is pending at the time of setting down the demurrers.

(Signed),

WM. B. RICHARDS, C. J.  
JOHN H. HAGARTY, C. J. C. P.  
JOS. C. MORRISON, J.  
ADAM WILSON, J.  
JOHN W. GWYNNE, J.  
THOMAS GALT, J.

## CORRESPONDENCE.

*Crown Counsel.*

TO THE EDITOR OF THE CANADA LAW JOURNAL.

It would scarcely seem necessary at this hour of the day to ask any questions as to the position of Crown counsel and the rules of professional ethics affecting them; but what I heard at the trial of a case at the last Toronto assizes shows a somewhat curious state of things to my mind, and suggests the inquiry: Is it etiquette for a lawyer who advises a private prosecutor, and has the conduct of his case, to appear on the trial of the indictment as Crown counsel and avowedly not as counsel for the private prosecutor?

The point came up recently on the trial of an indictment for libel of much general interest, the defendant being the manager of a newspaper company. It appeared, moreover, that the prosecutor commenced life as a shoemaker, whilst the defendant was said to be of good social position and of liberal education. The jury was a "common jury," and was, I presume, of the ordinary capacity.

In his closing speech the Crown officer referred at great length to the fact that the prosecutor was a poor man with five small children, whilst the defendant was a "grandee," "nabob," "aristocratic blood," "fashionable blade," &c., and stated that this "grandee," &c., was endeavouring to crush a man who was trying to raise himself in the social scale—wishing to "send him back to his last." He concluded by reading from his brief a long list of eminent men who were of humble origin and of ignoble birth, drawing attention to the difference in social position between the prosecutor and the defendant, and thus having the probable effect (I presume a lawyer is supposed to

know that he is responsible for the result of his acts) of prejudicing the minds of the jury against the defendant, without regard to the evidence.

As a matter of taste such fomenting of class prejudices is not what I should have supposed an enlightened Bar would be proud of. But such a course on the part of the Crown counsel is not what I should have expected to witness in this country at this period of the nineteenth century.

I may mention that the learned gentleman asserted most strongly that he was acting for the Crown and not for the private prosecutor. I should be glad to know your view on these points, as they seem to me of interest to the profession.

Yours truly,

COUNTRY PRACTITIONER.

[We have a horror of libels and politics and all such unpleasant public amusements, and should not have felt inclined to publish the above, but that it touches upon what is really a matter of great importance to the good name of the profession, viz.: that the counsel for the Crown should not go beyond the well-established and universally recognized line of conduct in conducting a prosecution. The theory is that the Crown is the protector of public rights, and stands between its subjects to see justice done according to law. The duty of the Crown officer, who is the mouthpiece of the Crown, is to see that all proper evidence against a prisoner or defendant is fully and fairly laid before the jury, and also to see that the cause of the accused is not jeopardized by improper evidence or prejudice. Whatever is "more than this cometh of evil," or arises from ignorance or want of temper. We should have thought that the safer plan to prevent any suspicion would be for a counsel who has acted for a private prosecutor to decline to act for the Crown in that particular matter.—Eds. L. J.]

## FLOTSAM AND JETSAM.

A judge, rejoicing in the well-known legal name of Doe, has lately made his appearance on the New Hampshire Bench, and is astonishing the professional world by his exhaustive judgments. In a recent partnership case, his opinion was 284 pages in length. He must consume and digest a vast amount of case law.

## FLOTAM AND JETSAM.

A case was being tried before a presbytery not long ago, when the counsel for the defendant urged the plea of moral insanity. A venerable presbyter said: "Mr. Moderator, the disease of moral insanity seems to me to be identified with what the older theologians in their unscientific way called total depravity."

Many years ago, Robert Treat Paine (father of the poet,) was one of the judges of the Massachusetts Supreme Court. He was very old, and the Bar desired him to retire from the Bench, so they appointed Harrison Gray Otis, who was very polite and accomplished, to go and see the judge and talk with him on the subject. He suggested to the judge that it must be a very great inconvenience to him to leave home so often and so long.

"Do you see as well as you used to?"

"Yes, I can see with my glasses very well."

"Can you hear as well as you used to?" (for it was notorious that he could not hear anything unless yelled through a trumpet.)

He said, "Yes, I hear perfectly; but they don't speak as loud as they did before the Revolution."

Many law books unavoidably partake too much of the nature of digests, and appear compiled with extracts from the works of others. This fault cannot be imputed to Mr. Goldsmith's volume, which indeed is marked with as much originality as well can be in a work of its kind. For instance, in speaking of the origin of a penalty in a bond he has the following passage:—

"It will appear rather surprising, if we recur to those principles of conscience and equity which seem to have been regarded with such favour, and enforced by the ecclesiastical judges whenever an occasion presented itself in opposition to the severer rules of the common law, that the penalty inserted in a bond should have so long escaped their animadversion, and that some expedient at least should not have been attempted in order to relieve an unfortunate obligor from the full amount of penalty, at once so absurd and so unjust. It serves, however, as a proof of the contradiction and inconsistency into which men are prone to fall, merely for the sake of maintaining some favourite theory or scholastic dogma; and, in order to avoid a principle at variance with their system, adopt an evil of tenfold magnitude. Thus, the monkish scholiasts appear, for a considerable period, enamoured with the Aristotelian notion that money is naturally barren, and to make it produce money is preposterous, and contrary to its original design. These writers also fancied that the taking of usury or interest for the loan of money was hostile to the spirit of Christianity, and therefore set their faces most resolutely against it. But it was very soon discovered that, unless mankind had no other inducements

to lend their money except the trouble and risk of recovering it, they would choose the safer course of keeping it in their own possession. The clerical judges, however, rather than sacrifice their theory, by fixing a moderate and unoppressive rate of interest upon borrowed capital, allowed the penalty in the bond (usually double of the sum borrowed) to be enforced against the miserable debtor, on default of paying the principal at the time agreed upon; he was thus, by ecclesiastical foresight and the decisions of the judges, preserved indeed from splitting upon the Scylla of usury; but, at the same time, he not unfrequently became engulfed in the Charybdis of their own invention."  
—*Goldsmith on Equity.*

One great objection to localising business, and therefore scattering the Bar, is that judges would cease to be controlled by that great moral influence which undoubtedly is at present exercised by a centralized Bar. Nothing proves this more forcibly than scenes which occasionally take place in County Courts. The nature of the general run of County Court business is certainly calculated to have a very bad effect upon the temper of everyone concerned, and it would be deplorable if all our judges became a sort of superior order of County Court judges. To show the length to which irritation is sometimes—rarely we ought perhaps to say—carried in the inferior tribunals, we direct attention to a scene in which Mr Josiah Smith, Q. C., as Judge, and Mr Garrold as advocate, were the actors. The action was brought to recover the value of a lamb, it being alleged that the defendant kept a lamb entrusted to him by the plaintiff, and substituted an inferior lamb. A question arising as to the probability of a ewe recognising its own lamb, the Judge inquired whether if a ewe were suffering from excess of milk it would not be rather glad to have any young lamb to relieve it? Witness replied in the negative, whereupon the Judge cited a case (not to be found in the books), of two cats of his own who were sworn foes until they both had kittens, whereupon in the absence of either the other took kindly to all the kittens. Mr Garrold, apparently feeling pressed by this case in point, abruptly observed: "We are talking of sheep, not cats." Subsequently the Judge referred to the two officers of the court as to the habit of ewes, and they (although not sworn) confirmed the witness; and, after hearing the defendant and his witnesses, the Judge said he considered the preponderance of evidence to be in favor of the plaintiff, and ordered the lamb in dispute to be given up. Thereupon Mr. Garrold threw the fee which the defendant had given him upon the table, saying that he declined to take a poor man's money with such

## CHANCERY AUTUMN CIRCUITS, 1774.

ruling from the Bench. It will be seen from the conversation which we report, that the advocate twitted the Judge with not knowing the law, with ruling ignorantly, and preventing as far as he could appeals against his decisions, and by his conduct driving the best advocates from the court. The learned Judge submitted to this abuse with a patience and forbearance simply astounding. He expressed a hope that Mr Garrold would apologise, to which the only reply was by Mr Garrold himself: "Oh, no, he won't. He is just telling the Registrar that he withdraws from all cases in which he was engaged in this court as an advocate." Looking to the small amount of provocation on the part of the Judge which produced this outburst, we can only conclude that the court is to be congratulated on Mr Garrold's announcement; but it reflects strangely on our County Court system that such a scene could possibly have thus ended without the law's representative having asserted his dignity more effectually than by a mild protest.—*Law Times*.

Two lawyers in a county court—one of whom had grey hair, and the other, though just as old a man as his learned friend, had hair which looked suspiciously black—had some altercation about a question of practice, on which the gentleman with dark hair remarked to his opponent. "A person at your time of life, sir,"—looking at the barrister's grey head—"ought to have acquired experience enough to know what is customary in such cases." "Yes, sir," was the rejoinder, "you may stare at my grey hair if you like. My hair will be grey as long as I live, and yours will be black as long as you dye."—*Law Times*.

## CHANCERY AUTUMN CIRCUITS, 1874.

## TORONTO.

THE HON. VICE-CHANCELLOR BLAKE.

TORONTO . . . . . Monday . . . . . November 9th.

## HOME CIRCUIT.

THE HON. THE CHANCELLOR.

OWEN SOUND . . . . . Tuesday . . . . . September 29th  
 HAMILTON . . . . . Monday . . . . . October 5th  
 ST. CATHARINES . . . . . Thursday . . . . . " 15th  
 SIMCOE . . . . . Tuesday . . . . . " 20th  
 GUELPH . . . . . Friday . . . . . " 23rd  
 BRANTFORD . . . . . Thursday . . . . . " 29th  
 BARRIE . . . . . Monday . . . . . November 2nd  
 WHITBY . . . . . " . . . . . " 9th

## WESTERN CIRCUIT.

THE HON. VICE-CHANCELLOR BLAKE.

BARNIA . . . . . Friday . . . . . September 25th  
 SANDWICH . . . . . Tuesday . . . . . " 29th  
 CHATHAM . . . . . Monday . . . . . October 5th  
 LONDON . . . . . Friday . . . . . " 9th  
 STRATFORD . . . . . Monday . . . . . " 19th  
 GODERICH . . . . . Friday . . . . . " 23rd  
 WALKERTON . . . . . Thursday . . . . . " 29th  
 WOODSTOCK . . . . . Tuesday . . . . . November 3rd

## EASTERN CIRCUIT.

THE HON. VICE-CHANCELLOR PROUDFOOT.

LINDSAY . . . . . Tuesday . . . . . September 15th  
 PETERBOROUGH . . . . . Friday . . . . . " 18th  
 COBOURG . . . . . Wednesday . . . . . " 23rd  
 BELLEVILLE . . . . . Tuesday . . . . . November 10th  
 " . . . . . " . . . . . " 17th  
 KINGSTON . . . . . Monday . . . . . " 23rd  
 BROCKVILLE . . . . . Thursday . . . . . " 26th  
 CORNWALL . . . . . Wednesday . . . . . December 2nd  
 OTTAWA . . . . . " . . . . . " 19th

## AUTUMN ASSISES, 1874.

## EASTERN CIRCUIT.

HON. MR. JUSTICE WILSON.

1 PEMROKE . . . . . Tuesday . . . . . September 22nd  
 2 PERTH . . . . . " . . . . . " 25th  
 3 CORNWALL . . . . . Monday . . . . . October 5th  
 4 L'ORIGNAL . . . . . Wednesday . . . . . " 12th  
 5 OTTAWA . . . . . Monday . . . . . " 19th

## MIDLAND CIRCUIT.

HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

1 NAPANEE . . . . . Monday . . . . . September 21st  
 2 PICTON . . . . . Thursday . . . . . " 24th  
 3 BELLEVILLE . . . . . Tuesday . . . . . " 29th  
 4 BROCKVILLE . . . . . Monday . . . . . October 13th  
 5 KINGSTON . . . . . Tuesday . . . . . " 20th

## VICTORIA CIRCUIT.

HON. MR. JUSTICE MORRISON.

1 BRAMPTON . . . . . Tuesday . . . . . September 22nd  
 2 WHITBY . . . . . Monday . . . . . " 23rd  
 3 COBOURG . . . . . " . . . . . " 29th  
 4 LINDSAY . . . . . Tuesday . . . . . October 5th  
 5 PETERBORO' . . . . . " . . . . . " 12th

## BROCK CIRCUIT.

HON. MR. JUSTICE STRONG.

1 OWEN SOUND . . . . . Tuesday . . . . . September 22nd  
 2 STRATFORD . . . . . " . . . . . " 29th  
 3 WOODSTOCK . . . . . " . . . . . " 5th  
 4 WALKERTON . . . . . Monday . . . . . " 12th  
 5 GODERICH . . . . . Tuesday . . . . . November 3rd

## NIAGARA CIRCUIT.

HON. MR. JUSTICE PATTERSON.

1 MILTON . . . . . Monday . . . . . September 21st  
 2 ST. CATHARINES . . . . . " . . . . . " 23rd  
 3 WELAND . . . . . Tuesday . . . . . October 5th  
 4 CAYUGA . . . . . " . . . . . " 12th  
 5 HAMILTON . . . . . Monday . . . . . " 19th

## WATERLOO CIRCUIT.

HON. MR. JUSTICE GALT.

1 BARRIE . . . . . Tuesday . . . . . September 22nd  
 2 BERLIN . . . . . Thursday . . . . . October 1st  
 3 GUELPH . . . . . Tuesday . . . . . " 6th  
 4 BRANTFORD . . . . . Thursday . . . . . " 15th  
 5 SIMCOE . . . . . Tuesday . . . . . " 27th

## WESTERN CIRCUIT.

HON. MR. JUSTICE GWYNNE.

1 ST. THOMAS . . . . . Tuesday . . . . . September 22nd  
 2 BARNIA . . . . . " . . . . . " 29th  
 3 SANDWICH . . . . . Monday . . . . . October 5th  
 4 CHATHAM . . . . . Tuesday . . . . . " 12th  
 5 LONDON . . . . . Wednesday . . . . . " 21st

## HOME CIRCUIT.

HON. MR. JUSTICE BURTON.

1 TORONTO (Oyer and Terminer) } Tuesday . Sept. 22nd  
 and General Gaol Delivery.)  
 2 TORONTO (Assize and Nisi) } Tuesday . Oct. 6th  
 Prius.

## LAW SOCIETY—TRINITY TERM, 1874.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODS HALL, TRINITY TERM, 28TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

ANGUS M. MACDONALD.  
FREDERICK ST. JOHN.  
JOHN ROSS.  
DONALD GREENFIELD McDOWELL.  
DAVID HILL WATT.  
JAMES PARKES.  
THOMAS B. BROWNING.  
JOHN RICE McLAURIN (admitted and called.)  
JOHN WRIGHT, under special Act " " "

And the following gentlemen obtained Certificates of Fitness:

JOHN BRUCH.  
JAMES PARKES.  
DAVID HILL WATT.  
RICHARD DULMAGE.  
JOHN ROSS.  
GEORGE B. PHILIP.  
FREDERICK ST. JOHN.  
THOMAS B. BROWNING.  
GEORGE R. HOWARD.

And on Tuesday, the 25th of August, the following gentlemen were admitted into the Society as Students-at-Law:

*University Class.*

CHARLES WESLEY PETERSON.  
JOHN ENGLISH.  
GEORGE WILLIAM HEWITT.  
DUNCAN McTAVISH.  
DONALD MALCOLM McINTYRE.  
THOMAS GIBBS BLACKSTOCK.  
WILLIAM E. HODGINS.  
FREDERICK PINLOTT BIRTS.  
ALFRED HENRY MARSH.

*Junior Class.*

ALEXANDER JACKSON.  
HENRY P. SHEPPARD.  
HORACE COMFORT.  
BAYARD E. SPARHAM.  
ARCHIBALD A. McNABE.  
WILLIAM SWATVIE.  
ALBERT O. JEFFERY.  
WILLIAM F. MORPHY.  
HAMILTON INGERMOLL.  
ALBERT JOHN MCGREGOR.  
ROBERT D. STORY.  
DENIS J. DOWNEY.  
ALFRED CARES.  
ALEXANDER V. McCLENNENHAN.  
CHARLES E. FARMAN.  
JOHN HODGINS.  
FREDERICK MURPHY.  
GEORGE W. HATTON.  
MARTIN SCOTT FRASER.  
FREDERICK W. A. G. HAULZAIN.  
WILLIAM PATTISON.  
RODERICK A. MATHESON.  
CHARLES E. S. RADCLIFF.  
*Articled Clerks.*  
PETER J. M. ANDERSON.  
JOHN H. SCUGALL.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes, Book 2; Virgil, *Æneid*, Book 6; Osear, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Osear, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,  
Treasurer

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR NOVEMBER.

- 1 SUN....22nd Sunday after Trinity. All Saints.
- 2 Tues....Primary examination of Law Students and Articled Clerks.
- 5 Thurs....Sir John A. Macdonald resigned, 1873. Battle of Inkerman, 1854.
- 8 SUN....23rd Sunday after Trinity.
- 9 Mon....H.R.H. the Prince of Wales born, 1841.
- 10 Tues....Last day for Clk. of P. to complete Jurors' book. (C. S. U. C. c. 31, s. 76.) Intermediate examination.
- 11 Wed....Battle of Chrysler's Farm, 1813.
- 12 Thurs....Last day for serv. for Co. Ct. Attys'. exam. Cands. for Call to pay fees and leave papers.
- 13 Fri.....Exam. for Call to the Bar.
- 14 Sat.....Exam. for Call with honours.
- 15 SUN....24th Sunday after Trinity.
- 16 Mon....Michaelmas Term beg. Certificates to be taken out.
- 20 Fri.....Paper Day, Q.B. New Trial Day, C.P.
- 21 Sat.....New Trial Day, Q.B. Paper Day, C.P.
- 22 SUN....25th Sunday after Trinity.
- 23 Mon....P.D., Q.B. N.T.D., C.P. Last d. to decl. for Co. Ct.
- 24 Tues....New Trial Day, Q.B. Paper Day, C.P.
- 25 Wed....P.D., Q.B. N.T.D., C.P. Last d. for set. dn. & givg. not.
- 26 Thurs....O. D. Q.B. O. D., C.P. Schol. Ex. of reh. in Chy.
- 27 Fri.....Scholarship Exam. N. T. D., Q.B. Open D., C.P. Last d. to give not. trial in Co. Ct. of Sup. Ct. case.
- 28 Sat.....Open Day, Q.B. and C.P.
- 29 SUN....Advent Sunday.
- 30 Mon....St. Andrew. Paper Day, Q.B. New Trial Day, C.P.

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## THE

## Canada Law Journal.

Toronto, November, 1874.

It is stated that the Master of the Rolls and the Vice-Chancellors in England have completed arrangements by which, after the long vacation, one judge will sit in Chambers once a week. The change is very satisfactory to the profession. It is in fact the adoption of a practice which has been for some time in force in this Province.

We have received from two different sources the first number of Election Court Reports for Nova Scotia, compiled by Benjamin Russell, Esq., Barrister and Clerk of the Court. We may have occasion to refer to them more at length hereafter. In the meantime we thank our friends for their courtesy. The want of head notes to the cases takes away much from the practical utility of these reports.

It is laid down by the Privy Council in *Richer v. Tryer*, 22 W. R., 849, that the judges' reasons for their decision in the Canadian Court of Appeal ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal. In the case referred to, (which was an appeal from Quebec) it appeared that one of the judges below had communicated the reasons of his judgment to the agents of the respondent's counsel, but the Lords of the Council refused to look at notes so irregularly communicated. The recommendation of the Privy Council as to public delivery of judgments is one which should be specially noted and observed by all judicial officers and courts from whom an appeal lies to a higher forum.



## RELATIVE IMPORTANCE OF CASE-LAW.

The last American Congress made a complete and authoritative revision of the statutes of the United States up to the year 1873. Some years ago the work of condensation was submitted to a commission of lawyers, and the result of their labours was laid before Congress. During last session, Congress delegated the whole matter to a committee composed of the lawyers and judges in the House and the Senate. This small professional body, with admirable zeal and patience, have taken the whole body of the statutory law of the States, and, in the language of Sir Francis Bacon, have "reduced the concurrent statutes, heaped one upon another, to one clear and uniform law." The whole of the revised statutes of the United States will now be given to the country in one or at most two volumes. We may well echo the language of the *Legal Gazette* of Philadelphia (from which our information is taken) and say "the importance of this work it is impossible to overrate."

RELATIVE IMPORTANCE OF  
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(Continued from page 274.)

Coming next to the considered decisions of Judges sitting in Banc or in Courts of first instance in Chancery, we find that the principles regulating the authority of such decisions are well settled. An erratic Judge will sometimes overleap the bounds imposed by the comity of Courts of co-ordinate jurisdiction, and run amuck against the decisions of other Judges of equal authority. But apart from this, it may be laid down as one of the rules observed by all Judges of first instance, that the latest decision upon a litigated question is the one followed in subsequent cases involving the same point. The language of Martin, B., in

*Reg. v. Robinson*, L. R. 1 C. C. 80, indicates this general principle. He observes as follows: "When a point has once been distinctly raised and decided in a reported case, I, for my part, regret to find such a question criticised and disputed over again. When a point has once been clearly decided, I think it is far better to acquiesce in the decision, unless it can be brought for review before a higher Court." And this submission to a prior decision will in ordinary cases be observed, even though the Judge deciding the latter case does not approve of the case he follows, as was done by Lord Selborne, sitting for the Master of the Rolls, in *Pike v. Dickinson*, 21 W. R. 862.

If, however, the latest decision is at variance with earlier cases, and they are not cited or considered therein, then it very much affects the value of such a decision. Earlier conflicting decisions being thus overlooked, the Judges have generally felt themselves at liberty to disregard the later cases, if such earlier ones are more numerous or more satisfactory to their minds. Thus in *Gillan v. Taylor*, 21 W. R. 823 (a case of charitable gift), Wickens, V. C., remarks: "I have unwillingly come to the conclusion that I am bound by the case of the *Attorney General v. Price*, 17 N. S. 371, and *Isaac v. Dr. Friez*, Ambl. 575. It is remarkable that those cases were not considered by Vice-Chancellor Wigram in *Lily v. Hey*, 1 Hare, 580, and of course one must treat Vice-Chancellor Wigram's decision with the greatest respect. If the *Attorney General v. Price*, and the other cases I have mentioned, had been before Vice-Chancellor Wigram in *Lily v. Hey*, I should have followed the more recent decision. As it is, I am not entitled to dissent from authorities so much in point." See also for an application of the same holding *Coote v. Whittington*, 21 W. R., 837, and *Rousell v. Morris*, 22 W. R., 67, where Sir George

## RELATIVE IMPORTANCE OF CASE-LAW.—TESTAMENTARY POWERS OF SALE.

Jessel, M. R., refused to follow *Coots v. Wittington*.

Malins, V. C., may not unfairly be classed as one of the erratic Judges above alluded to. He deals with the question we are considering in his own peculiar style, as reported in *Ferrier v. Jay*, 23 L. T. N. S., 302. "This point," he says, "has been before two learned Judges, whose decisions are in direct opposition to one another. On the bulk of the authorities, I am bound to follow the latter of the two decisions. Although all the authorities do not appear to have been cited in that case, I must assume that the Vice-Chancellor had them all in his mind when he made that decision."

Of the Irish Bench, Lord Justice Christian may be taken as one of the most illustrious types of the judicial Ishmaelite that the annals of the law can exhibit. His views upon this subject are given in *Re Tottenham's Estate*, Irish R. 3 Eq. 528: "When the decision of one Court is cited to another of co-ordinate authority, the latter has a right to regard it in a critical and even sceptical spirit; and while accepting the decision, to decline the reason of deciding, if a better one can be assigned. But I confess, I think that when an inferior Court (I mean inferior in the sense of curial procedure) has before it the decision of its non-appellate tribunal, it is the duty to conform itself frankly and loyally to the reason of the decision, and not merely to its letter."

The decision of a co-ordinate branch of the Court, or of a Court of co-ordinate jurisdiction, will be followed till reversed on appeal, in order to avoid an unseemly conflict of decisions: Per James, V. C. in *Re Times Assurance Co.*, 18 W. R. 404, and see also *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643. In *Boon v. Howard*, 22 W. R. 541, Keating, J., is reported to say, "There is no positive rule which precludes the Court from examining its previous decisions, though those are to be

departed from only on the strongest grounds. The Court ought to respect its own decisions and those of other Courts."

In *Owen v. London R. Company*, 17 L. T. N. S. 210, Cockburn, C. J., held, that as the authorities were somewhat divided, the Courts were entitled to exercise their own independent judgment on the question to be decided. In such a conflict of authority, the earlier decision was followed by Romilly, M. R., in *Hall v. Bushill*, 12 Jur., N. S. 243. But in making a choice among conflicting decisions, the considerations which ought to influence the Court are well expressed by Mr. Justice Jebb in *Loveland Coyne v. Bartley, Alc. & Nap.* 308, "When the Court is obliged to decide upon conflicting decisions, and one of them is of late date, of unquestionable authority, and is adopted by compilers, and text and elementary writers of character, and is also in accordance with the opinions of the Bar, so far as we can collect it from a series of authorities and precedents, we should not be warranted in making a decision contrary to that opinion."

(To be continued)

## SELECTIONS.

## TESTAMENTARY POWERS OF SALE.

There is, perhaps, no class of instruments which come under the cognizance of the law, where the intention of the parties is to form an element of consideration, in which greater difficulty arises in ascertaining that intention and enforcing it in accordance with the rules of law, than in wills; and in no branch of the construction of wills have the courts been driven to a greater nicety than in the interpretation of powers and trusts, and the discrimination between these two. To add to the inherent difficulties of the subject, the department of trusts is of later origin, or rather development, than the general rules of real property, and the enunciation of these by the elder authorities of the common law; and these latter,

## TESTAMENTARY POWERS OF SALE.

with the decisions founded on them, present quite as much conflict *inter se* as assistance towards forming a coherent or symmetrical system of the principles of this topic of the law.

In recurring, therefore, to the older authorities, great discrimination must be exercised in referring to cases, as support can readily be drawn from them for opposite sides of almost every question which arises in this department; and the true rule is rather to eliminate from than attempt to harmonize the various decisions and propositions of the text writers when determining what are powers and what trusts, and who are authorized to execute the former.

In *Tainter v. Clark*,\* which may be regarded as a leading case in this commonwealth, the court decided that an administrator *de bonis non cum testamento annexo* could not execute a power given by the will to the executor, to sell such of the testator's real estate as in his judgment was best to raise the money necessary to pay testator's debts and certain pecuniary legacies given by the will. The power in question was not coupled with an interest, but was united with a trust to dispose of the proceeds as executor, *i. e.*, to pay debts and legacies, and was given in the same clause in which the executor was appointed, and immediately following the mention of his name. It was also left to his judgment what parcel to sell, but a sale was imperative. The court rely upon the authority of Coke,† that a power given to "executors" to sell may be executed even though one dies, "because the plural number remains;" but otherwise, if it had been given to "I. S., I. N., &c., his executors," "because the words of the testator would not be satisfied;" and also refer with approval to the distinctions laid down by Mr. Sugden:‡ (1) that a power to two or more *nominatim* will not survive without express words; (2) where it is given not *nominatim*, but to two or more generally, it will survive while the plural number remains; (3) where it is given to "executors" merely, even a single executor may execute it; but (4) if to executors by name, it is at least doubtful if it will survive.

It will be perceived that these authorities were not expressly upon the point in issue in the principal case. They applied, however, to the general question of the transmission or survivorship of powers, and were considered decisive of the incapacity of the power in question to survive, because it was considered a bare discretionary power. But the court also place their decision on a second ground, derivative though distinct from the first, namely, that the administrator cannot succeed to powers as to realty reposed in the executor; relying upon the authority of *Wills v. Couper*§ and *Conklin v. Eger-ton*,|| and of a case in the Year Books.

To take in their order the two grounds herein relied upon, and which broadly present the two leading questions arising in reference to testamentary powers, it is apparent that the first goes upon the principle that where a testator has conferred a power it must be exercised by, and only by, the person or persons selected; and second, upon the collateral ground that an administrator, though clothed with the representative capacity, is not in the confidence of the testator, and cannot act as the testator's grantee, unless expressly named.

In regard to the first of these positions, to which the court in their judgment suggest no exception or modification directly, we must refer to the rules cited from Lord Coke and Mr. Sugden, to see what qualifications the court are disposed to admit. Now it is evident that in neither of these are any further departures from the testator's literal directions approved of, except in two cases, one of which is suggested by both these authorities, the latter only by Mr. Sugden. The first is, that where the power is limited to be exercised by executors generally, it may be executed while a plural number remains; and the second is Mr. Sugden's extension of this, to allow even one executor to sell where the power was merely given *ratione officii*, not *nominatim*.

It is, of course, to be borne in mind that the case above stated, as well as the rules just referred to, related only to what were viewed—whether correctly or not, we shall inquire further on—as mere powers. The distinction, which we main-

\* 13 Mete. 220.

† Co. Litt. 112 b, 113 a.

‡ 2 Sugd. Pow. (1st ed.) 165.

§ 2 Ham. 184.

|| 21 Wend. 480.

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tain was not properly kept in view in these authorities, was that between a bare power and a power coupled with a trust. A bare power is necessarily a discretionary one, and precisely to the extent to which it is a power merely, must be limited to the donee or donees, and cannot in any way be transferred or pass to any other person. It may be either a legal or an equitable power. But the distinction between these two classes is foreign to the point under consideration; for an equitable power may be one that equity will interfere to compel the exercise of, and so take it from the domain of the donee's discretion, and replace that by the discretion of the court of equity. But equity will do this only on the ground that, and to the extent to which, there is an interest vested in some person in the execution of the power, and which equity is bound to enforce; in other words, that the power is coupled with a trust.

This is the first distinction which is to be maintained in order to a correct view of the position of the authorities on this subject; and it will be seen, therefore, that our whole inquiry to ascertain the survivorship or not of any power resolves itself into the question whether the power is wholly discretionary throughout, or whether any part of it is compulsory, because a third person has an interest in its exercise, not dependant for its existence on the discretion of the donee of the power.

A second distinction, quite diverse in its nature from the one just commented on, is between bare powers and powers coupled with an interest. The latter phrase is often broadly employed to include every case where an interest is to vest by the exercise of the power. It is conceived that this is incorrect, and that the true meaning is, that an interest vests in the donees of the power, which is to be enlarged by the exercise of the power, or out of which the power is to take effect, as in case of a power of sale attached to a mortgage.\*

The cases which turn on this latter distinction rest on a very different principle from those of the first class. The limitation of an interest, whether legal or equitable in its nature with a power appended, enables the grantee to deal with the power as he does with the estate;

and if the latter is capable of being assigned, the power will also pass to the assignees, even without words of limitation to them in the original grant of the power. If such words are inserted, then the power can be exercised without the intervention of a court of equity; and if not, then at least with such intervention.

It is, however, evident, from an examination of the early cases, especially those of or anterior to the time of Lord Coke, that the full conception of the distinction first stated did not then exist in any proper sense, and that the only distinction established or even recognized was the second one, i. e., between bare powers and powers coupled with an interest. With the then partially developed jurisdiction of the court of equity, the existence of a duty in the nature of a trust underlying a power was not recognized as a ground for equitable interference.† The settled distinction was, that if an estate was devised to several executors or trustees in trust to sell, here the power would survive as coupled with an interest; but if devised in trust that the executors, &c., should sell, then it would not survive. Thus in *Atwaters v. Birt*,‡ on a feoffment to four to uses, there was a proviso that the uses should cease on (*inter alia*) the assent of the feoffees. One of the feoffees dying, the donor, with the assent of the other three feoffees, revoked the uses; but it was held void, Popham, C. J., saying that "before the statute of 21 Hen. 8, c. 4, the common law was, that if one devised his land to four to sell, and one of them dies, the survivors, because they have an interest, may sell; but if he had devised that three should sell the land, and one of them dies, the survivors, because they have but a mere authority, cannot sell." As authority, an anonymous case, some forty years earlier,§ is referred to. Here, after a devise by a *cestui que use* that A, B and C, the feoffees to uses, should sell to pay legacies, &c., A, one of the feoffees, died. It was questioned whether B and C could sell; "and it seemed not, and so it was ruled; but *quære*, if they had not been named A, B, and C, but feoffees only." So in the case of *Butler v. May*,|| on a devise to

† Lewin, Trusts, 430 et seq.

‡ Cro. Ellz. 866.

§ 4 Dyer, 177.

|| Dyer, 189, 190.

\* *Hind v. Poole*, 1 K. & J. 383.

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the use of such wife as the testator's son should marry, upon the nomination of four persons named, and one of these four subsequently died, it was held that the uses failed, because the power of nomination could not be executed by the survivors. Dyer and Browne, J. J., dissented, because they thought that the donees had by the grant an interest in the marriage as a feudal incident.

Where a power was not coupled with an interest, it seems, therefore, at this time merely regarded as a bare power or authority; and the only two cases in which others than the first donees of the power could exercise it were where, by the general terms in which they were described, it might be considered as not restricted to the individuals named, but to pass to two, or even a single survivor; or secondly, where there was no one named as donee of the power, that even a single survivor might execute it.

Thus, under this latter exception, in a case in 2 Leon. 220, where a man devised land to his wife for her life, and directed that after her death the lands should be sold, and the proceeds paid out to his next of kin, and made two executors, who both proved the will, after which one died; it was held that no one being named to execute the power, it went to the executors *virtute officii*, and the survivor might sell; and similar decisions were made in many other cases.

Yet though this rule obtained where no one was named to take the power, it was adjudged from even an earlier period that where the testator directed his lands to be sold by his executors, if one or more resigned, the accepting or qualifying executors alone could not sell, because the executors were in the nature of grantees, and must all act notwithstanding their resignation, as "a will of lands is not a testamentary matter;"\* and in like manner the power of a survivor to sell seemed to be limited to the case where the co-executor had deceased prior to the vesting of the power.† The case of *Bonifant v. Greenfield*,‡ cited by the court in a recent case in this State,§ to show that a power could be executed by the continuing executors, was not the

case of a bare power, but was a devise to executors to sell, which, as we have before intimated, was regarded as giving a power coupled with an interest which, as a joint estate, could well survive.

To enable the continuing executors to exercise such a bare power, the statute of 21 Hen. 8, c. 4, was passed, which authorized even a single qualifying executor to sell, but made no mention of the case of survivorship upon decease. The law upon this point seems to have been at that time that where the donees of a power not coupled with an interest were mentioned *nominatim*, the power could not survive; where, on the contrary, they were referred to generally, it would, at least while a plural number continued, and in some cases even to a single survivor. Thus, in the anonymous case above referred to, reported by Dyer,\* it seemed that if the donees were described as "feoffees," their survivor could well sell. So in *Lee v. Vincent*,† on a devise that testator's "sons-in-law" should sell, a sale by the survivors after one had deceased was held good: "it was adjudged a good sale, because he named them not by their proper names." So Perkins‡ lays down the law that one executor may sell where the will is that the executors shall sell and one refuses to intermeddle; and in the later case of *Houell v. Barnes*,§ one executor, the survivor of two, was allowed to execute a power of sale. The case of *Danne v. Annas*|| is sometimes referred to as an authority to the contrary¶; but this is an error, and it will be found on examination to turn on quite a different ground. The case was a devise that executors, of whom there were two, should sell with the assent of A. B. A. B. and one executor died, and a sale was then made, and held not good. But no reason is given by the court; and it was the well-settled rule that such assent as was here required was a prerequisite or condition precedent to the exercise of the power, and even the decease of one of those named to give such assent would defeat the power. \*\*

\* Dyer, 177.

† Cro. Eliz. 26.

‡ § 545.

§ Cro. Car. 382.

|| Dyer, 219 a.

¶ *Per Curiam*, in *Chandler v. Rider*, 102 Mass. 208, 270.

\*\* *Attwaters v. Birt*, Cro. Eliz. 856.

\* 15 Hen. 7, 11.

† Co. Litt. 113 a.

‡ 4 Cro. Car. 80.

§ *Gould v. Mather*, 104 Mass. 283, 290.

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Yet it is quite apparent, as we have said, from all the cases at this time, even those upholding the right of a single surviving executor to exercise a power not coupled with an interest, that the first distinction stated in this paper, namely, between bare powers and powers coupled with a trust, was hardly taken into consideration, and that whatever duty attached to the disposition of the proceeds of the sale, or whatever purpose the testator contemplated should be accomplished with them, no trust was considered to attach to compel or authorize the execution of the power, or enable it to survive, but it fell with the decease or incapacity of any one of those to whose exclusive discretion, by a strict literal construction, it was held to have been confided. *Qui hæret in litera hæret in cortice.*

It is true that, in the case above cited from Leonard's reports, \* the court say that the sale, under the power, was good, "for the moneys coming of the sale are to be distributed by the executors as legacies, and it appertains to the executors to pay the legacies, and therefore they shall sell." But this language was used, not as a reason why the power survived, but as a reason why the executors should have the power at all, and it survived under the same principle as was enforced in *Houell v. Barnes*.

We have gone somewhat into detail in discussing the older authorities, because, apart from their intrinsic value from their age, they are generally referred to in support of the rules regulating powers, as enunciated by court and text writers since.

As a consequence of disregarding the substantial intention of the testator as to the disposition of the avails of the sale, in a blind literal adherence to the confidence supposed to be had in the persons named as donees of the power, the courts were driven to great nicety and inevitable conflict in determining when the power was general and when such confidence was expressed. It is, perhaps, unnecessary to recur to the cases in detail, for their number is so great as to make a complete examination of them altogether beyond our limits of space. † It may be sufficient to refer, as an illustration, to Mr. Sugden's fourth rule, above cited, ‡

where it is left quite doubtful whether a power given to executors, but by their proper names though as executors, would survive the death of one.

Thus, suppose the ordinary case that a testator appoints A., B., and C. his executors, bequeaths divers pecuniary legacies, and then says, I direct my said executors to sell whatever land may be necessary for the payment of said legacies; this, according to Mr. Sugden's rule, would be a case where a *nominatim* power was conferred, and the right to its exercise would be defeated by the death of A. For it is considered as much a *nominatim* appointment of the donees of the power to couple their names with the gift of the power by the word "said," as if they were named in the gift of the power. But if, on the other hand, after, or before a similar appointment of executors, the clause giving the power had run simply, to "my executors," here the power would survive, being given generally.

It is, moreover, apparent, from the tenor of the rules laid down by Mr. Sugden, and by the approval of them by the court in *Tainter v. Clark*, that a distinction is drawn between executors and other persons in a fiduciary position, and the capacity of a power given to the latter to survive to a single person seems to be denied. Stress is laid on the so-called "office" of the executor, as if those who occupied this position had something of a *quasi* corporate nature, which did not extend to trustees generally. And this view is confirmed by the language of the text-books. In a recent able treatise on real estate\* it is said: "Where the power is to several persons having a trust capacity, or an office in its nature like that of the executors of a will, susceptible of survivorship, and any of them die, the power will survive, unless it is given to them *nominatim*, as to A. B. and C. D., naming them. In the latter case, the power would not survive unless it was coupled with an interest in the donees of the power." It will be observed here that the only distinction suggested in this passage is that already referred to, between powers coupled with an interest and bare powers, and that the latter cannot survive even if given to executors, if these are mentioned by name. But it

\* Ante, p. 673.

† See Perry, Trustees, § 402 et seq.

‡ Ante, p. 670.

\* 2 Washburn, R. P., 522 (1st ed.).

## TESTAMENTARY POWERS OF SALE.

is further inferrible from the author's language that, if there is no interest to which the power is annexed, it is necessary to survivorship that the donee should hold an office like that of executors; and the case of *Tainter v. Clark*, and Sugden's rule, before cited, are expressly referred to and relied upon.

It is, however, difficult to see any force in this distinction between executors and other trustees or persons in a fiduciary capacity. It is true that executors are commonly said to have an office; but the source from which they derive their official capacity, namely, the Probate Court, is precisely that which can give them no capacity to take by survivorship discretionary powers conferred by will. Exactly in so far as they have an office they are the creatures of the Probate Court. But it is from the testator only that they receive the power or discretion; and in this respect they do in no whit differ from any other trustees. All are equally grantees from the testator, and grantees only. Their relation to the land upon which the power is to be exercised is like that of grantees *inter vivos*, excepting only that the death of the donor does not revoke their power, but is the point at which it is established. This is clear from the earliest authorities, which distinguished between the testamentary functions of an executor and his duties as a grantee; holding the former capable of passing to an administrator *de bonis non*, but the latter not even divested by the executor's renunciation of his office, as this was intended by the court to apply only to his testamentary duties strictly. Thus, in the case already referred to, \* it was laid down "that if a man makes a will that his executors shall alien his lands, there, if the executors renounce administration of his goods, yet they may alien the land, for the will of the land is not a testamentary matter." Nor can it be said that this case applies only to absolute devises of the land, for here there was no devise of land, but only of a power. We shall, indeed, urge later that in this case such a power should pass to the administrator, wherever, at least, and to the extent that there was a trust imposed in regard to the disposition of the proceeds of a testamentary nature; as we have already suggested

that the failure to enforce such a trust at this early period arose from the then undeveloped state of the powers of a court of equity; but the point we make is still clear, that no distinction was here drawn between executors and any other trustees, as to the status of a power to sell conferred upon them, or, consequently, its capacity to survive. The same principle appears also in the cases heretofore cited, of the survivorship of powers given to sons-in-law, † feoffees, ‡ and the like. § Indeed, in the modern and very exhaustive case of *Conklin v. Egerton*, || the point was carried so far that such an administrator was held incapable to succeed to any powers involving a discretion conferred on the executor, although such succession had been conferred by statute; and this decision is cited and followed in *Tainter v. Clark*, ¶ *Greenough v. Welles*, \*\* and other recent cases. But the ground, and the only one, upon which these cases can proceed, is, that a broad line is to be drawn between the office of executor or administrator, which is conferred by the court, and the position of the executor as trustee, grantee, or donee under the will.

We regard, then, any reliance upon the "office" of executors to enable a power to survive to a single one as placed upon an unsound basis. On the contrary, we urge that there is no discrimination between executors and trustees in regard to powers, if these relate to testamentary duties; and that they will survive to a single trustee as well as to a single executor.

(To be continued.)

## IRISH JURIES.

A blue book has just been issued which illustrates in a very striking and painful manner one of the great difficulties of Irish administration. There are some things which a Government can do for a country, and there are other things which the people alone can do for themselves. In the latter category must be placed trial by jury. A Government can supply judges, but the working of the jury system demands the loyal and intelligent co-operation of the people. If that is

† *Ando*, p. 674.

‡ *Ibid.*

§ *Ando*, p. 674.

|| 21 Wm. 430; 25 id. 224, 232.

¶ 10 Cosh. 571.

\*\* 15 Metc. 220.

\* 15 Henry 7, 11.

## IRISH JURIES.

wanting, the whole thing breaks down. It has been said that the object of the British Constitution is to bring twelve men into a box, and Ireland has enjoyed the application of this sacred principle. It is obvious, however, that the value of the system depends in a great degree on the conduct of the twelve men when they have thus been brought together. The theory of trial by jury assumes the competence and honesty of the persons who compose the jury; but even the most frantical idolater of the institution would scarcely deny that the consequences are likely to be disastrous if the jurors fall below the requisite standard of character and intelligence. It was held that the lower classes in Ireland could not be required to have confidence in the administration of justice unless they administered it themselves. This experiment has now been in force for a year or two, with the most deplorable, though most natural, results; and anybody who wishes to understand the paralysis and perversion of justice which at present prevails in Ireland cannot do better than study the Report of the Committee of the House of Commons on the Irish Jury System which has just been published.

The first witness examined was Mr. Hamilton, an Irish barrister, who has had great experience on the subject. He told the Committee that there was really no such thing as trial by jury in Ireland, and that even the fiction of it would disappear under the slightest strain. The last two years, he said, had been quiet, but "in case of any agitation or disturbance you would have to suspend trial by jury altogether." The result of the present system had been to put "a mass of prejudice, ignorance, and disaffection on the panel." In ordinary cases the juries simply did what the judge directed; but in cases where there was any agrarian or other disturbing element there was usually no finding. The lower class of jurors were either terrified by the Ribbonmen or were friendly to them; and there was "to a considerable extent a sympathy with crime" on the part of juries. Mr. W. Ormsby, sub-sheriff of the County and City of Dublin, gave similar evidence. Juries were hopelessly ignorant, and it would be better to abolish them altogether than go on with the present system. Mr. West, Chairman of Wexford County,

pointed out that the tendency of the existing system was to introduce class feeling into the jury box. A gentleman in his county fired four pistol-shots at another, but the accused was represented as "a favourite of the people," and got off easily. His attorney said, "I put the frieze-coated gentlemen on the plaintiff, and made him consent to a plea of guilty for a common assault." In short, disagreements and acquittals in the teeth of evidence are of frequent occurrence. Mr. De Moleyns, Chairman of the County of Kilkenny, thought there was a feeling among the lower sort of jurors that "they were one class" with the prisoners, and that they had strong sympathies with them. He added that jurors were systematically canvassed by the friends of prisoners, and were "exposed to injuries in different ways which we hardly appreciate." Mr. Leahy, Chairman of the County of Limerick, stated that, with the new jurors, there was the greatest difficulty even in the clearest cases in getting a verdict at all. They made all sorts of excuses for disagreeing—that nobody actually saw the crime committed, that there was only one witness, and that was not enough, and so on. In one case a juror sent a doctor's certificate of his inability to attend, but he afterwards turned up because he had been canvassed by the friends of a prisoner to try to get him off. Mr. Bolton, Crown Solicitor for Tipperary, mentioned a case in which one of the jurors was drunk, and another was found to have come home from seven years' penal servitude for cattle-stealing. He also confirmed other witnesses as to the frequency of bad acquittals—"sixteen at Clonmel, and fourteen of them as bad acquittals as could be pronounced." Cases of murderous violence were frequently reduced by juries to mere ordinary assaults. The common cry to jurors on going into the box was, "Go in and free the boys." The practice of canvassing jurors was "becoming quite alarming in Tipperary," and persons supposed to have influence were taken on cars round the country canvassing jurors. Mr. Boyd, another Crown Solicitor in Tipperary, reported that canvassing was very largely practised there, and "very extraordinary" verdicts were often given. In Kildare a juror declared that he could not find a prisoner guilty under any circumstances, because



## IRISH JURIES.

"he might himself be guilty of the same to-morrow." In Ennis there was a case of shooting with intent to murder. The blunderbuss exploded, and the assassin's hand was blown off, and was produced in evidence. The man was acquitted by a jury, many of whom "had come twenty miles to try the boy," and who immediately adjourned with his friends to a public-house to celebrate the event. The prisoner himself is said to have asked for his hand back, and the judges remarked that he might as well have it.

Mr. Murphy, Senior Crown Prosecutor, Dublin, stated that, as far as his experience went, in any case of agrarian outrage, faction fight, or serious assault between farmers or farmers' sons, and so on, there was very little use in prosecuting in a great part of the South of Ireland at the present time. At New Pallas, in the County of Limerick, for instance, the population is divided by an old feud about the age of a bull into what are called factions of "Three-year-olds" and "Four-year olds;" and "terrible crimes, not merely savage assaults, but brutal murders, have occurred, and very recently." Yet there is a difficulty in repressing these outrages, because juries will not convict. Perhaps the strongest evidence as to the incapacity of the Irish Juries is that given by Baron Deasy. In Sligo, he said, there was a case of ejectment on notice to quit; the notice was the only point in the case, and was, in fact, admitted. But the counsel for the defendant got up and implored the jury to stand between an oppressive landlord and the widow and orphans; and the consequence was a verdict for the defendant, in opposition to the direction from the judge. The "poor widow" in this case was a lady of large fortune, with a town-house in Merriion Square, and another house in the country, and the oppressive landlord was merely trying to get back his own property. In Galway the state of things is said to be truly deplorable. Out of a panel of 265 jurors, "not one-fifth were capable of trying any case whatever, civil or criminal." In a case of sheep-stealing, the prisoner's counsel challenged every man who was decently dressed and seemed intelligent; the Crown objected to the ragamuffins; and the result was that we went through the whole of the 265 names without being

able to get a jury." Ultimately some "set asides" were taken in, but a verdict could not be got after all. In an action for trespass, as to the facts of which there was no dispute, the jury would not agree to find any damages; "perhaps," says Baron Deasy, "because they thought that the plaintiff, being an hotel-keeper, had no right to have land at all." In another case a son had murdered his father and signed a confession, but his counsel argued that the confession was dictated by a sentiment which especially animates the Irish breast, a sense of filial affection, and that he had made it to screen his mother, an old woman aged eighty, who was too feeble to lift her hand. The prisoner was acquitted.

It is clear from this evidence that a very great mistake was committed in introducing a lower class of jurors into the box. It is not merely that many of these men are too ignorant and stupid to understand the nature of the cases which they have to try, but that they act under the impression that they have been brought there to take care of themselves as a class, and to see that "poor men" come to no harm. Mr. Serjeant Armstrong defended the change in the system on the ground that "he would do anything to satisfy the men in the dock that they were to get a fair trial;" and he drew a touching picture of a jury, "with not so much as a necktie, hardly a shirt" among them, trying a prisoner of the same rank, but "dressed up a little for the occasion." He had observed, he said, the good moral effect of a verdict found by such men, who were really the peers of the prisoner. "A general sigh goes through the gallery when they find that peasant has convicted peasant." There is no doubt a certain amount of truth in this, and it is of the utmost importance that men of the lower classes should be convinced that they have the same chance of being fairly tried as other people. But it is rather a dangerous experiment to put into the hands of the lower classes, especially when they are so ignorant and prejudiced as those of Ireland, the power of thwarting the efforts of justice to reach criminals in their own rank of life; and it is evident that this is the use which a great many of the new jurors have made of their privilege. The question is, what is to be done when peasant will not convict peasant, or give

## \* RAILWAY UNPUNCTUALITY.—DOGS IN COURT.

a verdict against one in a civil suit when his antagonist belongs to a higher class? In addition to the case of the poor widow with a town and country house, Baron Deasy mentioned three similar cases which were called before him, but very soon after the jury was sworn the landlords compromised with their tenants rather than go on; and he added that he thought it not improbable that this was on account of the appearance of the jury. It is not surprising that, after hearing this testimony, the Select Committee should have arrived at the conclusion that the qualification of Irish jurors was too low, and that the system required amendment. It is possible that some of the alterations proposed may have a good effect; but in the meantime a vast amount of mischief has been done, and it is to be feared that any attempt thoroughly to reform the system will be keenly resisted.—*Saturday Review*.

## RAILWAY UNPUNCTUALITY.

At the Manchester County Court (Mr. J. A. Russell, Q.C., judge) an action was brought by Mr. Becker, teacher of music, to recover a sum of 5s. from the London and Northwestern Railway Company. The plaintiff, on Friday in Whitsun-week last, left Victoria Station by one of the defendants' trains for Golburn, near Warrington. The train was timed to arrive at Newton Bridge at five minutes to twelve, allowing the plaintiff twenty-seven minutes to catch the train which left that place for Golburn. The train, however, did not arrive at Newton Bridge until twenty-five minutes past twelve o'clock, and the plaintiff, in consequence, was unable to catch his train. The next train leaving for Golburn was not until twenty-five minutes past two o'clock, and as this was too late to enable the plaintiff to keep an engagement, he took a cab to Golburn. For this he had to pay 5s., which he now sought to recover. Mr. Kersley, who appeared for the railway company, put in their regulations, by which they stated that they did not undertake that trains should start and arrive at the specified times in the time-tables. His Honour ruled that these regulations only referred to ordinary risks, and did not apply to the case in question. Special notice

ought to have been given that on that particular day passengers must use the train at their own risk. Passengers had a right to presume that special care would be taken to convey them during that week as at other periods. He desired it to be known that railway companies had no right to voluntarily overload their ordinary trains, and if they did the public had their remedy. A verdict was then entered for the plaintiff for the amount claimed, with costs.—*Law Journal*.

## DOGS IN COURT.

The dog has often been called the friend of man, but he might more justly be termed the friend of the lawyers. There has really been an extraordinary amount of litigation about the dog. Some few years ago the head-note to the report of a dog-biting case in a legal contemporary formed the subject of mirth throughout the Temple and Westminster Hall. We will not trouble our readers with a *réchauffé* of *Smith v. The Great Eastern Railway Company*, because we do not wish to enter upon an inquiry as to the gender of the plaintiff, the dog, or the cat in that case, or who it was that was waiting for the train, or whether the porter kicked the plaintiff, the dog, or the cat out of the signal box. Before and since our contemporary thus immortalized himself, the judges in Westminster Hall have been worried and bothered as to the *scienter* in actions brought to recover damages for canine assaults. In *Stokes v. The Cardiff Steam Navigation Company*, 33 Law J. Rep. N. S. 2 Q. B. 310, the dog had previously bitten a person in the presence of some of the servants of the company; but, as none of those persons had the control or care of the dog or of the premises in which the dog was, or of the defendants' premises, the court held that there was no evidence that the defendants knew of the character and disposition of the dog. In *Gladman v. Johnstone*, 36 Law J. Rep. N. S. C. P. 150, it was proved that the wife of the defendant occasionally assisted in her husband's business; that the business was carried on upon the premises where the dog was kept; and that a formal complaint as to the mischievous character of the dog had been made to the

## DOGS IN COURT.—LANDLORD AND TENANT.

defendant's wife, for the purpose of being communicated by her to her husband. The court held that there was evidence in this case to go to the jury of the defendant's knowledge of the character of his dog. In *Baldwin v. Cassella*, 41 Law J. Rep. N. S. Exch. 167, the guilty dog was kept at the stables of the defendant, under the care and control of the defendant's coachman; the defendant supposed the dog to be harmless, but the coachman knew that the dog was of a mischievous nature. The court held that knowledge on the part of such a servant was enough to fix his master's liability. Last week, in the case of *Appleby v. Percy*, in the Court of Common Pleas, the defendant was a licensed victualler, and kept the dog which bit the plaintiff on the premises where the defendant carried on business. On two former occasions the dog had flown at customers, who had complained of its conduct to the waiters at the bar of the public-house. The question for the court was whether these complaints were sufficient to prove the defendant's knowledge of the character of the dog. At *nisi prius*, Mr. Justice Honyman had directed a nonsuit, and this ruling was upheld by Mr. Justice Brett. On the other hand, Lord Coleridge and Mr. Justice Keating thought that there was evidence of the *scienter* to go to the jury. Thus we find that, after repeated discussions in courts of law, eminent judges are at variance upon what seems to be a very simple point, and so we are induced to suppose that this difference of judicial opinion is rather the result of external causes than of the intrinsic difficulty of the matter itself. The fact is, that the injustice of a law which refuses to a plaintiff a remedy for a wrong unless he can show that somebody else has previously been the victim of a similar wrong, insensibly inclines the minds of judges to relax the rule. Surely the time has arrived when the legislature should be asked to class human beings with cattle and sheep, and to protect "person" to the same extent as it does "property." By 28 and 59 Vict., chap. 60, the owner of every dog is liable in damages for injury done to any cattle (including horses, *Wright v. Pearson*, 38 L. J. Rep. N. S., Q. B. 312) or sheep by his dog, and it is not necessary for the party seeking such damages to prove a previous mischievous

propensity in such dog, or the owner's knowledge of such previous propensity. No one has ever attempted to show that this Act has been burdensome or unfair to owners of dogs; and, if we may judge from the rarity of actions under this statute, the effect of it has been to induce owners of dogs of doubtful character to put an end to the possibility of the dogs doing harm. If the Act were extended in the way we have suggested, all dogs of a spiteful, snapping or biting disposition would either be kept under the control of collar and chain, or be deemed to be no longer worth the animal tax. The indignant words of the Lord Chief Justice, uttered on Monday last in the case of *Hockaday v. Wheeler*—"What business had a man to keep a savage brute like this? he might as well keep a lion"—would then acquire real potency. As it is, people seem to be utterly indifferent as to the safety of their neighbours; and whenever a plaintiff seeks damages for the bite of a dog, the defendant strains every nerve to prove that, while the whole neighborhood knew the dog to be an awkward customer, the defendant supposed the dog to be as harmless as a lamb. Meanwhile, lawyers are frightened by mad dogs in Fleet Street, while in Westminster Hall almost as much confusion is created by eminent judges differing on the simplest and most threadbare question known to the law.—*Law Journal*.

In *Leonard v. Stover* the Supreme Judicial Court of Massachusetts has recently decided that the owner of a building with a roof so constructed that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, is not liable to a person injured by such a fall upon him, while travelling upon the highway, provided the entire building is at the time let to a tenant who has covenanted to make "all needful and proper repairs, internal and external." The same court decided in *Shepley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346 and 106 Mass. 194; 8 Am. Rep. 318, that if the owner of the building has control of the roof he is liable.—*Albany Law Journal*.

## CODIFICATION OF THE LAW OF NATIONS.

Since our last issue we have received the *Continental Herald*, containing the first day's proceedings of the International Association for the Reform and Codification of the Law of Nations. Among the members present from the United States were: Mr. David Dudley Field, Hon. Charles P. Daly, Judge Peabody, Dr. J. B. Thompson and Dr. Miles; while from England and Continental Europe were present a number of well-known publicists; and even Japan had one representative. The members of the Association were welcomed by the President of the Conseil d'Etat in a very admirable little speech, which was responded to by Mr. Field, the President of the Association. Aside from the report of the secretary, there was little done beside a considerable, apparently, desultory talk. A goodly amount of solid work was however planned for the session, and we hope it was accomplished, for however sceptical we may be about the attainment of the ultimate object in view, there can be no doubt that the two associations, whose meetings have been held this year at Geneva, are doing a good work. As was said by M. Carteret, the Cantonal President: "Whatever difficulties there may be in drawing up a good code of International Law, and above all in securing its vitality and advancement, there is room to entertain legitimate hopes in this respect. From every quarter there is something of this sort expected, and—sign of approaching moral conquests—from different quarters and under divers forms, individual or collective efforts are being made at the present moment tending in the same direction: that is to say, that law should replace force in international relationships." — *Albany Law Journal*.

## CANADA REPORTS.

### ONTARIO.

#### ELECTION CASES.

##### CORNWALL ELECTION PETITION.

D. BERGIN, *Petitioner*; v. A. F. MACDONALD, *Respondent*.

*Common Law of Parliament.*—The Common Law of England relating to Parliamentary elections is in force in this Province.

*Agency.*—What acts constitute a person an agent in a Parliamentary election, considered. — Canvassing combined with other acts. — An accumulation of trifling acts. — Attendance at meetings. — Entrusting a person with money for election purposes. — Canvassing in company with candidate.

*Sub-agents.*—When a large and general authority is given to an agent, the candidate will be held responsible for the acts of sub-agents of such person.

*Corrupt practices.*—Rule when there appears to have been general corruption, or only isolated cases of bribery. — Money given to sub-agents to expend without accompanying directions. — Colourable purchases. — Colourable charity and liberality. — Loans of money. — Hiring conveyances to take voters to poll.

*Costs.*—Costs should follow event, although the personal charges against the respondent fall, unless put in wantonly, or unless expense of trial has been thereby increased.

[CORNWALL, Sept. 2-7, 1874.—SPRAGGE, C.]

The petition contained the usual charges, but the seat was not claimed by the petitioner, who was the unsuccessful candidate. The case was tried at Cornwall before the Chancellor.

James Bethune and McIntyre appeared for the petitioner.

Harrison, Q. C., D. B. MacLennan and H. S. Macdonald, for the respondent.

SPRAGGE, C.—The enquiry divided itself into two branches. 1st. That relating to the question of agency. 2nd. That relating to the commission of corrupt practices.

With reference to the question of agency, the contention of the Counsel for the respondent, that what was known as the

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Common Law of Parliament does not apply to elections to the House of Commons, can not, in my opinion, be supported. It would be more accurate to refer to this law as the Common Law of England relating to Parliamentary elections, and in the absence of any expressed intention to the contrary, it must be held to come within the Provincial enactments introducing generally the Common Law of England. *Reg. v. Gamble & Boulton*, 9 U. C. Q. B. 546, is an authority in support of this view.

The law of agency as regards Parliamentary elections is not the ordinary law of agency, but a special law. The usual rule is, that where an agent acts contrary to his instructions, the principal is not bound; but in Parliamentary agency it is different, for there the principal is liable for all acts of the agent whatsoever, even though they be done contrary to his express instructions. (His Lordship referred to the remarks of Blackburn, J., in the *Bewdley Case*, 1 O'M. & H. 16.)

As to the evidence of agency, mere canvassing of itself does not prove agency, but it tends to prove it. An act, however trifling in itself, may be evidence of agency,—and a number of acts, no one of which might in itself be conclusive evidence, may together amount to proof. It is hardly necessary to observe that an agent need not be a paid agent.

In this case Mr. D. B. Maclelennan was an agent for whose acts the respondent was responsible. Mr. Maclelennan was instrumental in overcoming the reluctance of the respondent to become a candidate. He acted with the respondent in various matters connected with the election; went to the factories at Cornwall with him; canvassed part of the town; went to the meetings at St. Andrews with the respondent; held meetings for the promotion of the election at his office, at which the respondent personally attended. It was a clear case of agency. Even two or three of these circumstances alone, perhaps even one, without the others, would establish agency clearly. There was no authority from the respondent to Maclelennan to corrupt the constituency, but there was no necessity for this authority in order to render the respondent liable for corrupt acts done by Maclelennan.

The entrusting of large sums of money, as has been done in some cases in England, is only one of the modes of appointing a chief agent, and is not essential to such appointment.

Henry Sandfield Macdonald must also be considered as an agent of the respondent. He canvassed the township with the approbation of

the respondent. He drove the respondent through the township and introduced him to voters, and he did not on these occasions accompany the respondent as a mere driver, for the respondent on two or three occasions waited for his convenience, showing that his personal attendance was considered desirable. He took so active a part in the election that he considered himself justified in calling the meetings at St. Andrews. At the first meeting he suggested to those present what should be done to further the election; at the second he examined the results of the canvass. The evidence of agency was very cogent.

I think the general authority given to D. B. Maclelennan and H. Sandfield Macdonald empowered them to employ sub-agents, for whose acts the respondent would be liable in like manner as for their own acts.

Besides Mr. D. B. Maclelennan and Mr. Henry Sandfield Macdonald, the sub-agents appointed by them, and those who were appointed canvassers at the meetings in St. Andrews and in town must also be considered agents for whom the respondent is answerable.

With reference to the first meeting at St. Andrews, it has been said that it was not regularly convened. Certainly there was less regularity and formality about its calling than is usual in such cases. But this regularity or formality is by no means necessary. If the meeting assembles, and has the sanction of the candidate, this is sufficient to render the candidate liable for its acts, and those of agents appointed by it. The object of the meetings at St. Andrews was to secure a canvass of the township, not merely to discuss election matters.

Where the number of those present at a meeting is very large, that is a reason why all present should not be considered as being appointed agents. It is clear in this case that the whole 150 or 200 present at the meeting were not appointed agents; certain of them only were requested to canvass their neighbourhoods, and, to use the words of a witness, "to interest themselves in the election." It is these persons alone who can be considered as agents. It is immaterial whether a committee be formally or informally appointed. It is sufficient if certain duties be assigned to its members and the candidate sanction this assignment of duties. Here the respondent drove out to the meetings with Mr. D. B. Maclelennan, one of his chief agents. He was present during the meetings, and was there undoubtedly to further his own election. He cannot be considered as a mere spectator. Being present

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at the meetings, he must be presumed to have been cognizant of all that was done, and therefore must be considered as having acquiesced in all that was done. Even if the respondent had not been present himself, the presence of his chief agents, MacLennan and Henry Sandfield Macdonald, would have rendered him liable for the action of the meeting. We must not look at the form but at the substance of what took place. And I think that the canvassers appointed at the St. Andrews meetings must be considered as agents for whom the respondent is responsible. The *Westminster Case*, 1 O.M. & H., 82, and the *Wigan Case*, ib., 188, do not apply. In those cases the associations were without doubt voluntary.

As to the meetings at MacLennan & Macdonald's office in Cornwall, the persons who attended those meetings must be deemed agents of the respondent. These persons examined the voters' lists, appointed canvassers, and received reports of his canvass. The usual formalities, as to calling together the meetings, and the transaction of business, appear to have been observed, but this was unnecessary. The respondent acquiesced in the acts done. (His Lordship here read the remarks of Blackburn, J., on the definitions of agency in the *Taunton Case*, 1 O.M. & H., 185-6; also the remarks of Willes J., as to the responsibility of a candidate for the acts of his agents in the *Coventry Case*, ib., 107.)

As to the second branch of the case, namely, that relating to the commission of corrupt practices, these consist principally of acts of bribery. Bribery is not confined to the actual giving of money. Being an unlawful act, it is to be expected that attempts will be made to conceal it from the light of day. The Courts, therefore, have always examined the various acts connected with the transaction, to see whether there is a corrupt motive. Where a grossly inadequate price has been paid for work, or for an article, it is clearly bribery. And in the present case several instances of such bribery occur. In considering the question of corrupt practices as affecting any particular election, we should also examine the whole evidence carefully to ascertain the mode and spirit in which the election contest has been carried on; whether it has been on the whole pure and free from corruption, or whether there has been a general laxity of principle and evident disregard of the law. When the corrupt acts are isolated much greater strictness of proof will be required.

One thing that strikes me in this case is the large sum expended by the two chief agents of

the respondent, a sum averaging about \$2 a head for the votes polled for the respondent.

Large amounts were also paid without any express directions as to their application, amounts which would not be required for any legitimate use. In the case of Donald Miles McMillan, for example, the words used upon the money being handed to him were "Here, you may require it." If this money were applied improperly, it must be considered that it was intended so to be applied.

Again, when Henry Sandfield Macdonald, having "heard that the North West Corner was corrupt," gave \$140 or \$150 to George McDonald, of Molinette, to expend there without any directions as to the mode of expenditure, the only inference must be that it was to be expended in order to corrupt. This inference is supported by the statement of George McDonald, who, on being asked why he accepted the money, replied that he was apprehensive "that the other side were going to bribe," which implies that he considered his side should do so as well.

There were many similar cases in which considerable sums of money were paid without directions as to the application, but it is unnecessary to dwell upon these further than for the purpose of showing the general spirit in which the contest was carried on on behalf of the respondent. In the case of Gilbert Runnions bribery with the knowledge and consent of Henry Sandfield Macdonald, one of the chief agents of the respondent, is proved.

Henry Sandfield Macdonald, when he handed the money to George McDonald, named Runnions as a person to whom money should be given. And the money was paid to Runnions by G. McDonald, as Runnions admits. This is the same as if H. S. Macdonald gave it himself.

The evidence of George McDonald and that of Runnions differs as to the amount paid, but this is immaterial—money was paid.

In other cases Henry Sandfield Macdonald left the giving of the money to George McDonald "on discretion." This was a direct appointment of George McDonald as agent. And in exercise of this discretion, George McDonald bribed Cannon and the two Worleys.

The payments by Donald Miles McMillan to the Clines and to Murray are other instances of bribery. In the case of the Clines, McMillan paid money to them, or as he afterwards says to one of them, nominally for the purchase of oats, but at the time of the alleged purchase no quantity of oats was named, no time for deli-

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## CORNWALL ELECTION PETITION.

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very was specified, no receipt for the money was taken, and no oaths have as a matter of fact been delivered; the alleged purchase was undoubtedly a mere colourable proceeding. The fact that the Clines and Murray declared their intention to vote for the respondent does not affect the case.

Again, the payment of \$10 to Alguire by Henry Sandfield Macdonald falls within the rule of inordinate and excessive payment. Where \$4 or \$5 would have been sufficient, the excess must be considered as given for some other purpose, which purpose was "corrupt."

The payment of \$50 to the Rev. Mr. Smith, I think, falls within the rule as to "colourable charity," or "colourable liberality," referred to in the cases, and was therefore given with a corrupt motive.

With reference to the loans of small sums to various persons, we must of course take into consideration that the firm of MacLennan & Macdonald was in the habit of lending small sums. But the lending of various sums amounting to \$210 at 6 per cent., is certainly suspicious, since it is admitted by Mr. Macdonald that the current rate was 8 per cent., and no reason is given why 6 per cent. only was asked. I think the reasonable inference must be that the loans were made with a view to the election. It is not necessary, however, to lay much stress upon these transactions.

The loan of \$150 to Dupuis is very clearly a case of bribery by Duncan G. McDonald, a sub-agent. The loan was for two years, without interest, a note being given to secure repayment. The note was originally drawn payable with interest, but this was changed. Dupuis says in his evidence that McDonald "got nothing but my vote for the money." Is not this a stipulation that Dupuis should have the loan without interest if he would vote? Was it not a present of the two years' interest?

Again, Morrisette was an active agent. He attended the meetings at MacLennan & Macdonald's office in Cornwall. He examined the voters' lists. He had \$140 entrusted to him. As to the disposition of this money he gives a very confused account, but the promise of \$15 to Fitzpatrick's daughter was clearly an offer of a bribe. He said he would give the money if she got her father to vote, and the offer of a bribe is equivalent to a bribe, although it requires clearer and stronger evidence to support it.

The payment of money by Wood to Aaron Walsh was also illegal. Here the note endorsed by Walsh was paid by him 25 years ago.

He considered the payment a hardship, but he does not deny his liability. The fact that the money paid by Wood was not furnished by the respondent or either of his chief agents, makes no difference. The endeavour by Wood to restore friendship was undoubtedly done to influence the vote.

In the case of Alexander McDonald, the exercise of forbearance in pressing the judgment in the hands of MacLennan & Macdonald was evidently with the view of influencing the vote.

These cases of bribery are sufficient to render the election of the respondent void, and I shall only make a few remarks on the other circumstances disclosed in evidence.

The treatment of Heath was a gross wrong, and one of those stratagems inexplicable to right thinking men. The case of Charles Mullins was also a very gross case. A stratagem was used in inducing him to get into the sleigh driven by Grant, and in spite of his remonstrances he was driven into the country and thereby prevented from voting. I consider the conduct of Donald McMillan, a justice of the peace, who was present, and knew that an outrage was about to be committed, and yet did not interfere, as deserving of the strongest censure. The case is as gross a one as can well be conceived.

As to the hiring of the special train, I think there was no personal impropriety in the case. A mere hiring of a conveyance to carry voters is not an act wrong in itself, and would not be so at all but for the express provisions of the law. And I am inclined to think that the hiring in this instance does not fall within the meaning of the law, and that it is the same as the case of one sending his own carriage.

I am not required in this case to say whether the corruption was so general as that the election should on that account be set aside, but an election may undoubtedly be void on that ground: *Bradford Case*, 1 O'M. & H. 40.

I exonerate the respondent personally from any complicity in the corrupt acts committed, but I think that it is my duty to say that I can scarcely conceive that Mr. D. B. MacLennan and Mr. H. S. Macdonald would have acted in the manner in which they appear to have acted at this election if they had appreciated the gravity of the acts committed by them.

My judgment, therefore, is that the election is void. Costs to be paid by the respondent.

I do not think that the fact that the personal charges against the respondent have failed should alter the usual rule that costs follow the event. The expense of the trial has not

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been increased by these personal charges, and they have not been put in wantonly, in order to wound the feelings of the respondent; if they had been, that might have altered the case. These charges also are usual, and are excusable on the ground that the opposite party is generally ignorant of what is done by the respondent, and in order that evidence affecting the candidate personally may be given these charges must be made in the petition. In thus deciding as to costs, I am following a principle laid down by me in a case of *Ashworth v. Ashworth*, which came before me in Chancery.

*Election set aside.*

#### NIAGARA ELECTION PETITION.

NEIL BLACK ET AL., *Petitioners*, v. J. B. PLUMB,  
*Respondent.*

*Agency—Sub-agency—To what extent—Costs.*

*Held* that a candidate is responsible for the corrupt acts of sub-agents and persons acting under them.

*Seem*, that no limit can be placed to the number of parties through whom the sub-agency may extend, even though the chain is not purposely lengthened.

The learned Judge declined to decide what witness fees should be paid by the respondent, thinking it to be the province of the taxing master on taxation, after hearing both parties, to decide what witnesses to allow or disallow, as in ordinary cases.

[NIAGARA, Oct. 20-22, 1874.—HAGARTY, C. J. C. P.]

The respondent placed a sum of money in the hands of one Gunn, who was the Secretary of a Manufacturing Company, of which the respondent was President, to be used as might be required for the expenses of the election as well as for the use of the Company and for that of the respondent's household, should it be required for the latter purposes, whilst the respondent was engaged in the contest, which occupied all his attention. There was no Bank agency in the neighborhood. Gunn, being a stranger in the locality, and having had no experience in election matters, handed \$1,200 of the sum he so received to one Wilson, who was pointed out to him as a strong friend of the respondent, and who bore a high character, with instructions that the money was to be used for the legitimate expenses of the election. The respondent was not aware that this money had been given to Wilson, or of how he had disposed of it, until long after the election. Wilson distributed part of the money in large sums among active political friends of the respondent, but he did not direct them as to how the money was to be spent. With the rest he paid

various election expenses and returned a balance to Gunn. The respondent had repeatedly urged upon his friends his desire that no money should be spent improperly.

No acts of bribery sufficient to avoid the election were proved, except a few cases by some of the parties to whom Wilson had given money, but these persons were not agents except they became so through the acts of Gunn and Wilson.

*Hodgins*, Q.C., and *J. G. Currie* appeared for the petitioners.

*C. Robinson*, Q.C., and *O'Brien* for the respondent.

It was admitted that if the respondent was responsible for the acts of the parties who had received money from Wilson, and had been guilty of bribery, the election must be set aside; and the arguments were mainly directed to this point.

*C. Robinson*, Q.C. There is no evidence of wide-spread corruption here, nor under the circumstances has the expenditure been large, and everything negatives any improper acts or motives on the part of the respondent, or any suspicion that money was being spent improperly. The money was given Gunn in good faith, and he in like manner gave part of it to Wilson. There is no authority for making a respondent liable for the acts of the agent of a sub-agent. The *Benedley Case*, 1 O'M. & H. 16, does not go that length, nor the *Cornwall Case*, (*infra*.) If so responsible, where is the limit to his liability? It might be different if it were shown that the sub-agency had been extended purposely, but that was not the case here.

*Hodgins*, Q.C. The placing a large sum of money in the hands of Gunn without overlooking its expenditure, was an act of carelessness which was evidence of wilful blindness on the part of the respondent. Gunn was only the conduit pipe through whom the money went to Wilson, who was in effect the agent, and his sub-agents committed acts of bribery for which respondent was responsible to the extent of his seat.

HAGARTY, C. J. C. P.—This constituency consists of the town and township of Niagara. Six hundred and forty-two persons voted, and the respondent had a majority of thirty. The respondent agreed to come forward on the 12th January, the polling took place on the 29th of January. The respondent is Chairman of the Steel Works Company, of which Mr. Gunn is Secretary, and acts as local Treasurer. He was appointed on the 1st of January, and only



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came to reside in Niagara on the 15th of January last. There is no bank agency or express office here.

On the 26th January respondent sent Gunn to Toronto with a letter to Mr. Gzowski, a stockholder and director of the Company. Respondent told Gunn that money would be wanted for the general purposes of the election, and also for his own purposes and for the Steel Works. He had men then at work on his own premises. Gunn presented the letter to Mr. Gzowski, who went with him to the Montreal Bank and spoke to the manager, who then gave Gunn \$1,992.50, and he informed respondent thereof. The latter authorized Gunn to disburse money required for the election, cautioning him distinctly to see that none of the money was used for anything but perfectly lawful purposes, and on several subsequent occasions said the same thing.

The respondent was very busy about the election, and nothing whatever seems to have taken place between them as to the subsequent expenditure. Gunn knew hardly any one in Niagara, and next day, at the suggestion of one Burk, and others, handed \$1,200 of this money to Dr. Wilson, a well-known physician here, and respondent's medical adviser, thinking he was the proper person to deposit it with for lawful expenses, taking no receipt. Gunn says he had no idea or intention that the money should be improperly spent. He afterwards paid several hundred dollars more for various expenses—printing, and some very heavy livery bills. He gave \$100 back to respondent, and after paying all the calls upon him had a balance of over \$100 on hand, which he applied to other matters not connected with the election.

Dr. Wilson admits the receipt of this money, understanding that it was to be used for election purposes, not unlawfully; and he says he did not know whose money it was. The Doctor sent \$250 of this money to one Lowry, in the St. David's division, sending it in an envelope by one Murphy without any letter or message, simply addressed to Lowry. Murphy swears he gave it to Lowry, not knowing there was money in it. Wilson also gave \$250 to Thomas Hiscott, in the division of Virgil, without any instructions; and also \$200 to Longhurst, in the remaining, Queens-ton, division. He also paid \$100 to Thos. Burk, \$40 to J. T. Kirby, for expenses, and small sums to others. One Kennell, a non-elect, was paid \$100 for services, and Wilson returned \$28 or \$29 to Gunn.

Dr. Wilson says he did not intend to use the money for improper purposes, as he is opposed to such. He thought the parties to whom he paid it were responsible persons. He gave no instructions to the persons to whom he gave the money, how they were to use it, nor did he ask how it was used. With the money so received, Longhurst, as his evidence shows, committed several clear acts of bribery, and disposed of some of the money in a most suspicious way, giving his nephew, a voter, \$60 of it, telling him to do as he liked with it, meaning about the election; and \$70 to another man, much in the same way, never asking any account of it.

Out of this \$250 given to Lowry he returns \$65. He says he paid one Stuart, after the election, for lawful expenses, horse hire, lights and fuel, \$180, but he can tell nothing about whether the claim was real or false, or anything about this man Stuart. Lowry, in my judgment, committed at least one act amounting to bribery in Mrs. Hanniwell's case.

In the third case, that of the money given to Hiscott, for the Virgil division, one Walter Thompson says that he found \$250 in an open box in his stable. Just before he saw Hiscott standing in the road, and no doubt the latter placed it there. This money Thompson divided among five or six people the night before the polling, telling them to go to work at once. He made no inquiry how it was spent, nor was any attempt made to prove that it was spent honestly.

Bribery was also committed by Robert Best to the extent of \$40, but I do not consider that the respondent was in any way affected by it.

The respondent was examined and gave a full account of his candidature. He said from the beginning he was determined to make or sanction no illegal expenditure, and repeatedly announced this his resolution both publicly and privately (in this he is fully corroborated); that this was his first experience in elections, and he had no idea of the costs. There were certain charges made against him as to transactions in Albany, which he found it absolutely necessary to refute publicly before the electors, and in the short space before the polling he spent three days in the United States getting evidence, and had to spend a great deal in printing. There was no local paper or printing office, which caused more expense. His whole expenses, he said, were between \$2,000 and \$2,100, \$1,800 being spent through Gunn. He himself paid a St. Catharines paper for

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printing in April last \$100, a shorthand reporter \$50, and necessary telegraphing from \$75 to \$100. His personal expenses were under \$5.

He denied any act of bribery, direct or indirect, or any knowledge thereof, and as to treating he only spent 70 or 80 cents, and that I think was not for any purpose or motive connected with the election. No attempt was made to prove any personal knowledge on his part of any of the specific wrongful acts or payments. He says that until quite lately, in fact the last week or two, he did not believe the petition would be proceeded with, and never, till he found it was really coming to trial did he make any enquiry as to the charges. He and Gunn both state that it was only within this period that he was made aware how Gunn had disposed of his money. He never suspected or knew that these sums were paid to Dr. Wilson, or disposed of by him as proved. He accounts for his ignorance by stating that he had perfect confidence in Gunn's intelligence and integrity, and having given Gunn explicit instructions not to spend any money illegally he did not think that anything was wrong; that his cash transactions were very large, and that his general habit was not to close up or balance his accounts till the end of each year, and so he had not yet examined how the cash stood with Gunn. When he discovered the amount that had actually been expended he says he was much surprised, and thought it was altogether too large.

I think the respondent, under the peculiar circumstances of his canvass, has satisfactorily accounted for his not having personally superintended Gunn's expenditure during the election.

On a review of the whole evidence, I see no reason to doubt the respondent's very emphatic denial of any corrupt motive or intention. I accept his declaration that he entered into the contest intending to spend no money illegally, and that he was in no way cognizant of any illegal act.

It remains to be considered whether his election is to be avoided for the undoubtedly corrupt acts of some of his friends.

Assuming for argument's sake that neither Gunn nor Wilson actually intended to violate the law, I cannot conceive how they could have taken any course so calculated to arouse suspicion and to make what they say was meant to be right appear to be wrong as the course they did adopt. The respondent trusts Gunn with the

disbursing of his moneys. The latter, on somebody's suggestion, hands \$1,200 of it to Dr. Wilson in the vaguest manner, giving no directions, and never enquiring as to its employment. If he made Wilson the paymaster, it is not easy to see why he did not refer parties coming with claims for lawful expenses to Wilson. He paid them himself without enquiring whether the large sum given to Wilson was or was not exhausted. He never asked for an account from Wilson, but let him do as he pleased. I look upon the relation of both Gunn and Wilson to the respondent in the same light, and I think the latter is as clearly responsible for what Wilson did as if Gunn had done the same act—when Wilson gives to Longhurst (for example) \$200 to use as he might please, about the election, of course in the promotion of respondent's interests. With part of this money Longhurst commits several clear acts of bribery.

My strong impression is that the agency continues under these circumstances, and the respondent's election must be affected thereby. The same might be said in Lowry's case and in Hiscott's, whom Dr. Wilson was pleased to trust with \$250 for the Virgil division, to be expended as he pleased. The placing of it in Thompson's stable to be found by the latter can hardly be referable to a transaction intended to be honest, and the subsequent distribution of it by Thompson raises the gravest suspicion that the whole proceeding was intended to be an evasion of the law, and resulted in an illegal expenditure.

If I do not hold the agency to continue in the case, I think I would be as far as in me lies rendering a wholesome law inoperative and opening a wide door to corrupt acts.

The *Burdley Case*, 1 O'Malley & Hardcastle, 18, I think strongly supports this view. Sir Colin Blackburn's judgment is very explicit. There the respondent deposited a large sum in the hands of one Pardoe, directing him in his letter to apply the money honestly, but not exercising, either personally or otherwise, any control over the manner in which this money was spent, etc., not in fact knowing how it was spent. He then says, "I can come to no other conclusion than that the respondent made Pardoe his agent for the election, to almost the fullest extent to which agency can be given. A person proved to be an agent to this extent is not only himself an agent for the candidate, but also makes those agents whom he employs."

\* \* \* An agent employed so extensively as is shown here makes the candidate

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responsible not only for his own acts, but also for the acts of those whom he, the agent, did so employ"; "even though they are persons whom the candidate might not know, or be brought into personal contact with. The analogy that I put in the course of the case is a strong one. I mean that of the liability of the sheriff for the under sheriff, where he is not merely responsible for the acts which he himself has done, but also for the acts of those whom the under sheriff employs is not only responsible for the acts done by virtue of the mandate, but also for the acts done under colour of the mandate, matters which have been carried very far indeed in relation to the sheriff. I think these principles must govern this case."

I do not think that bribery prevailed extensively; most likely large portions of the money proved to have been paid to certain individuals did not go beyond the payees. I shall report that the respondent was not duly elected, and that his election is void, and that he must pay the costs of the petition; that no corrupt practices took place with his assent or knowledge; and that corrupt acts were committed by Wm. Longhurst, and David Lowry, and Robert Best. I am inclined to look leniently on the loans made by Best. He very frankly told his story, and honestly put the worst construction on what he did, although many others would probably have insisted it was all right. After much consideration, I have decided not to report Walter Thompson or Murray Fields, but I think the disposition of the money they received was most reprehensible.

It was urged upon me by Mr. Robinson that I should make some special order as to the costs of certain witnesses said to have been subpoenaed for to be in court, but who were not called by the petitioners. I do not see that I have any material before me to warrant my making any order now beyond directing, as I do direct, that no costs be allowed petitioners for any witnesses summoned or in attendance, respecting any charge of undue influence, threatening with loss of office, salary or income, or the opening or supporting houses of entertainment for the accommodation or treating of electors, as I consider that the case disclosed no such practice, and that such charges were unwarranted. In my view of the law, I think it is in the province of the taxing master, after hearing both parties, to decide what witnesses to allow or disallow. Such is his duty, I think, in ordinary cases. It does not follow because a party is successful and entitled to the general costs of the cause, that he is entitled to the costs of all the witnesses

he may subpoena; nor is the fact of their being called, or not called, the test of their being reasonably taxable.

I cannot conclude without expressing my strong sense of the admirable manner in which the case has been conducted on both sides, and the total absence of all irrelevant statements and of any undue waste of the public time.

*Election set aside.*

## IN THE COUNTY COURT OF THE COUNTY OF MIDDLESEX.

CORSAINT *qui tam* v. TAYLOR.

*Action for not returning conviction.—Division Court jurisdiction.—Tort.*

*Held.*—That Division Courts are by virtue of 32 Vict., cap. 23, sec. 1, O., courts of record.

2. That a penal action for not returning a conviction is founded on *tort*, and for that reason cannot be brought in a Division Court.

[LONDON,—Sept. 10, 1874.]

Action against a magistrate for non-return of convictions pursuant to C. S. U. C., cap. 124, sec. 2.—Verdict for penalty \$80, at Middlesex spring assizes, before Mr. Justice Morrison. A certificate for full costs was asked for by the plaintiff, thinking it might be necessary, but the learned Judge declined to decide the point. Plaintiff, however, signed judgment and taxed full County Court costs.

*Edmund Meredith*, defendant's attorney, took out summons calling on plaintiff to show cause why taxation should not be reviewed, on the ground that the action was within the competence of the Division Court, which was a Court of Record.

*W. H. Bartram* showed cause. The opinion of Mr. Justice Morrison, in *Re Judge of County of York*, 81 U. C. B. 270, that Division Courts are courts of record, was not necessary for the decision of the case, and the point was apparently not argued by counsel. 32 Vict. (Ont.), cap. 23 sec. 1, does not necessarily make a Division Court a court of record. It merely affects the proceedings of the court after judgment. The enactment seems to refer to the limitation of 20 years. See *McDonald v. McKinnon*, in note on p. 276 O'Brien's Division Court Manual. A number of courts in the United States are courts of record for some and not for other purposes; and see *Bouvier's Law Dictionary*; *Dwarris on Stat.* 342. But even if Division Courts be courts of record, this action is for a *tort*, and be-

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yond its jurisdiction. *Drake qui tam v. Preston*, 34 U. C. Q. B. 264 and cases there cited, and sub-section 1, sec. 55, cap. 19 Con. Stat. U. C., cap. 19, sec. 55, sub-section 1. And lastly, the statute gives the penalty, together with full costs of suit recoverable in any court of record. The full costs are part of the penalty.

R. M. Meredith supported the summons, relying on *Re Judge of County of York supra*. The action is in form for debt, and is within sub-sec. 2, sec. 55, cap. 19, Con. Stat. U. C.

ELLIOT, Co. J.—In considering this matter the first question is as to whether the Division Court is a court of record. The 32nd Vict. provides that judgments in the Division Courts shall have the same force and effect as judgments of courts of record. Now if these judgments have all the qualities of records they must be records, and a definition of a court of record is, I believe, a court where judgments are finally enrolled as records. One would suppose that if the Legislature had intended them to be such, it would have plainly stated that they were courts of record, instead of merely providing that their judgments should have the same effect as if of courts of record. But to hold that they are not courts of record would, it seems to me, involve a contradiction. Mr. Justice Morrison, in *Re Judge of York*, cited in the argument, expresses his opinion that this language constitutes Division Courts courts of record, and I accordingly conclude that they are, and being such this action could have been brought there, provided there is no other reason to the contrary.

This brings me to the second question, namely, the verdict being \$30, is this action within the jurisdiction of the Division Court? That court has jurisdiction in all claims and demands of debt where the amount claimed does not exceed \$100. Now it is true the action is in form for a debt, but I think it is really founded on a tort: Chitty on Pleading, 7 ed. vol. I. p. 52; *Bastard v. Hancock*, Carth. 361; *Barnard v. Joelling*, 2 East 569; a proposition which is further supported by *Drake qui tam v. Preston*, cited by plaintiff. Then this action, being *ex delicto*, is beyond the jurisdiction of the Division Court, which is limited in such cases to \$40 by sub-sec. 1, sec. 55, cap. 19, Con. Stat. U. C. Upon this ground I have, therefore, come to the conclusion that the plaintiff is entitled to full County Court costs.

*Summons discharged.*

## UNITED STATES REPORTS.

### NEW YORK COURT OF APPEALS.

#### ALPHEUS CHAPMAN V. SILAS ROSE.

#### *Negotiable instruments—Effect of signatures fraudulently obtained.*

If a person negligently signs a negotiable instrument, relying upon the representations of another as to its contents, whereby he is fraudulently induced to sign a different instrument from the one he had engaged to sign, he can not resist payment of the same when in the hands of a *bona fide* holder for value.

This was an action on a promissory note, brought by Chapman against Rose, and tried at the Circuit Court at Newburgh, in November, 1871, before a jury, Hon. Joseph F. Barnard presiding.

On the trial it appeared that on the first day of February, 1871, a person, representing himself as Alfred E. Miller, came to the defendant, a farmer, at his barn in the town of Warwick, and asked him to take an agency for the sale of a patent hay-fork, which defendant finally consented to do. Miller then requested him to sign an agreement creating and accepting the agency, and also a printed order for one hay-fork, which order was attached at the bottom. He also requested defendant to execute a duplicate of the agreement and order, which he did; and Miller took the one and defendant kept the other. It was understood that defendant was not to pay for any forks until he had actually sold them. This was all that passed between them. About seven months afterwards the defendant was notified by the plaintiff in this suit to pay a promissory note, purporting to be made by the defendant Feb. 1 1871, for \$270, payable to Alfred E. Miller or bearer, seven months after date, and transferred to the plaintiff before maturity. Defendant, although conceding that the signature looked like his, denied that he ever made the note, and the plaintiff brought this suit on it. The charge of the trial court, which is the ground assigned as error, is stated in the opinion. The verdict and judgment were for the defendant, and the plaintiff appealed. The judgment was affirmed at General Term (44 Howard's Practice Reports, 364), and the plaintiff again appealed.

W. Vanamee and Charles H. Winfield for plaintiff.

W. J. Groo for defendant.

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JOHNSON, J.—The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action, and that even if it was delivered and the plaintiff neglected to make proper inquiry as to its origin, he was not a *bona fide* holder and could not recover.

The exception to the charge was general, but if both propositions were erroneous the error can be reached and corrected, especially as the attention of the judge appears to have been called by request to charge to the precise grounds on which the charge is now claimed to be erroneous. The latter branch of the charge presents the question of notice to put a party on inquiry as affecting his right to be regarded as a *bona fide* holder. It is now, however, the settled law, that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character: *Welch v. Sage*, 47 N. Y. 143; *Seybel v. National Currency Bank*, Comm. of Appeals, 1873, MS.; *Murray v. Lardner*, 2 Wall, 110; *Goodman v. Simonds*, 20 How, 343. This part of the charge, therefore, can not be sustained. If, then, the appellant can maintain the position that the other branch of the charge is also erroneous, he will be entitled to a reversal of the judgment, notwithstanding the generality of the exception.

The evidence tended very strongly to show that the signature of the defendant to the note sued upon was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one Miller; that when he signed it he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He had just before signed an order for the delivery to himself of a hay-fork and two grappling-pulleys, amounting together in price to nine dollars, for which he engaged to pay, and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and

that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is whether it is enough as against a *bona fide* holder to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that inquiry the attention of the judge at the trial was distinctly called, and the instruction which he gave and which was excepted to did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper—it will be a premium offered to negligence. To insure irresponsibility, only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary at least to hold firmly to the doctrine that he who by his carelessness or undue confidence has enabled another to obtain the money of an innocent person shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representation of another, he puts confidence in that person, and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to answer to it.

In *Foster v. MacKinnon*, L. R. 4 C. P. 704, the action was upon an endorsement of a bill of exchange, and the evidence was that the defendant endorsed it believing it to be a guarantee, that being represented to him as its nature by a person in whom he put confidence.

The judge charged the jury that if the defendant signed it not knowing it to be a bill, and believing it to be a guarantee, in consequence of a fraudulent representation as to its character, and if he was not guilty of any negligence or laches in signing it, he was not bound. The jury found for the defendant. Upon a review of the decision, and after a very full and able discussion of the questions involved, the court held the direction at the trial to have been right. But a new trial was granted upon the ground that they were not

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satisfied with the finding of the jury on the question of fact, as I understand it, in respect to the question of negligence.

In *Whitney v. Snyder*, 2 Lansing, 477, evidence had been refused that the defendant was unable to read, and that the note which he had in fact signed was represented to him to be an instrument of a different character and was signed by him under such a belief. The court held that the evidence ought to have been received, principally upon the grounds and authority of the case last cited, approving both branches of the rule as stated in that case, and adding that the case then in judgment was stronger for the defendant on the question of negligence than was *Foster v. MacKinnon*. This was clearly so, for in *Whitney v. Snyder* it appeared that the defendant could not read, and he was, therefore, compelled to put confidence in some one as to the contents of any paper which he might be called upon to sign. Indeed, the same exception in respect to negligence is recognized as a necessary element in the decision at General Term in this case. The difficulty is that at the trial the judge rejected that qualification of the rule, and held that if the party did not intend to make a promissory note he could not be held bound even in favor of a *bona fide* holder for value. The principle involved is recognized and in substance decided in *Putnam v. Sullivan*, 3 Mass. 45. In that case the defendants had left with a clerk some signatures on blank pieces of paper intended to be used as notes or endorsements, according to specific instructions. The clerk was induced by fraud to part with one of these blank signatures and it was filled up as a note, leaving the signature to appear as that of a payee and endorsee. The action was by a holder in good faith, and the court giving judgment, by PARSONS, C. J., said: "The counsel make a distinction between the cases where the endorser, through fraudulent pretences, has been induced to endorse the note he is called upon to pay, and where he never intended to endorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail: as, if a Chinaman had a note falsely and fraudulently read to him, and he endorsed it, supposing it to be the note read to him. But we are satisfied that an endorser can not avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one or two innocent parties must suffer. The loss has been occasioned by the misplaced confidence of the en-

dersers in a clerk too young or too inexperienced to guard against the act of the promissors." Upon those grounds the endorsers were held liable.

In *Douglas v. Matting*, 29 Iowa, 498, the judge says: "It is better that the defendant and others who so carelessly affix their names to papers, the contents of which [are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

In all these cases the real ground of decision is not that the party meant to make a promissory note, but that, meaning to make an obligation in writing, and which was put in writing, that it might of itself import both the fact and the form and the measure of the obligation, he trusted another to fix that form and measure without exercising that supervision which was in his power, and by which perfect protection was possible. In such cases the rule is, that he is bound by the act of him who has been trusted, in favor of a holder in good faith.

The judgment must be reversed and a new trial granted, costs to abide the event.

JOHNSON, J., reads for reversal and new trial. All concur.

*Judgment reversed.*

—Central Law Journal.

## NEW BRUNSWICK.

DIGEST OF CASES DETERMINED BY THE SUPREME COURT OF NEW BRUNSWICK, IN  
EASTER AND TRINITY TERMS, 1874.

(From Pugsley's Reports, Vol. II. No. 3.)

### *Abatement—Non-Joiner of Defendant—Evidence—Pleading.*

The plaintiffs contracted with "C. C. & Co." to do certain work. An action having been brought against C. C. and A. S. and W. S. to recover for work done on the contract and damages for breach of it by the defendants, the latter pleaded in abatement the non-joinder of W., who, they alleged, composed the "Co." with A. S. and W. S.

*Held*, that the plaintiffs having had reasonable grounds for believing that the three defendants alone composed the firm of "C. C. & Co.," it was sufficient to join them as defendants.

Where evidence in reply is pressed in against the opinion of the Judge a new trial may be granted; but whether it will be granted, or not, must depend upon the circumstances of each case.

## DIGEST—NEW BRUNSWICK.

Where a special contract is set out in the declaration, and the plaintiffs obtain judgment by default, or on demurrer, the contract is admitted as stated in the declaration, and evidence which would have been admissible under the general issue will not be received on an enquiry to assess the damages.—*McDonald v. Cummings*. 283.

*Construction of contract—Where it is susceptible of two meanings—Misdirection.*

Where an instrument is susceptible of two meanings, one of which is reasonable and probable, and the other altogether improbable, it ought to be construed in the former sense, unless it is clear that the other construction was intended.

J. agreed to deliver to M. a quantity of lumber. At the time of entering into the contract, the former signed a writing as follows:—"When the season's shipments are over, if M. cannot turn out 8 for lumber as paid J., J. will take off 25 cents of each superficial, or the loss if any."

*Held*, that this meant that the deduction of 25 cents was intended to be a maximum sum, and that the words "loss if any" would only apply in the event of the loss being less than 25 cents per thousand.

Where the substantial question in this case was whether a sum of money was paid as a settlement of accounts, the Court refused a new trial moved for on the ground of misdirection, in the Judge leaving to the jury whether a draft for the amount was a settlement, no draft being in evidence—it being quite immaterial whether the money was paid by means of a draft or not.—*Jones v. McIntosh*. 343.

*Carrier—Damage for breach of contract—Loss of baggage—Detention and expense.*

The plaintiff, being a passenger on the defendants' railway, gave his baggage in charge of their servants. The baggage having been lost, the plaintiff sued for the value of the articles, and damage sustained in consequence of such loss, both in expense incurred thereby and loss of time.

*Held*, that the damage must be confined to reasonable expenses of searching for the baggage, such as telegraphing, cab-hire in going to the defendants' office, &c.—*Morrison v. E. & N. A. Railway Co.* 295.

*Incorporated Company—Election of Directors—Proxy, voting by—Practice—Attorney—Defending action without authority—Setting aside appearance and staying proceedings.*

At the annual meeting of the stockholders of the Albert Mining Company, held for the purpose of electing Directors, one of the stockholders moved that certain persons (naming them) be the Directors of the Company for the ensuing year.

*Held*, that in order to defeat their election, other parties must be nominated and elected by a majority of votes, and that it would not be sufficient for the majority merely to vote against the persons nominated, without voting for some one else.

*Held*, also, that to give a person the right to vote for another by virtue of a proxy, he must distinctly put forward his claim to do so, and must explicitly vote in the name and on behalf of the stockholder whose proxy he holds.

It was also held, in an action brought against the Company, that if the service was on, or the attorney entering appearance was authorized by, other than the duly qualified officers of the Company, the Court would stay proceedings without payment of costs.—*Spurr v. Albert Mining Co.* 260.

*Trespass—Justice of the Peace—Want of jurisdiction—Reasonable and probable cause—Costs—Validity of Dominion Act 32 and 33 Vict. c. 29 § 134.*

The defendant, a Justice of the Peace, issued a warrant to arrest the female plaintiff, on an information stating that she did "unlawfully take and carry away from his (the informant's) protection his daughter S. W." The Justice professed to act under the Dominion Statute 32 and 33 Vict., c. 20 § 56.

*Held*, in an action for assault and false imprisonment, that the defendant had no jurisdiction to issue a warrant on this information, and was liable to an action of trespass, and that the question of reasonable and probable cause can only arise where the Justice has jurisdiction over the matter.

*Stiles v. Brewster* (4 Allen 414) discussed. *Quære*, whether the Dominion Act 32 and 33 Vict., c. 29, § 134, relating to costs in actions against Justices, is not *ultra vires* the Federal Parliament?—*Whittier v. Dibbs*. 243.

*Trespass—Justice of the Peace—Action against for false imprisonment—Irregularity—Commitment of prisoner to "safe custody" other than common gaol or prison.*

Information having been laid on oath before the defendant, a Justice of the Peace, against the plaintiff, he issued a summons and copy, but the copy was defective in not containing the return day. The constable made oath before the Justice that he had served a true copy of the summons, whereupon, the plaintiff not appearing at the return, the defendant issued a warrant for the plaintiff's arrest. On being brought before the defendant, the plaintiff refused to enter into a recognizance, and was thereupon remanded to the "common gaol at Kingston," King's County, for five days, from which he was discharged by a Judge's order. An Act had just been passed, not known to the defendant, removing the shire town from Kingston, and making the common gaol of St. John or Westmoreland the common gaol of King's.

An action for false imprisonment having been brought against the Justice,

## DIGEST—NEW BRUNSWICK.

**Held, 1.** That as the defendant had jurisdiction over the subject matter of the complaint, and, when the constable made the affidavit of service of the summons, also over the plaintiff's person, trespass would not lie without malice or want of reasonable and probable cause.

**2.** That the plaintiff's imprisonment at Kingston being only a remand for safe custody until the complaint could be heard, it was legal, though the building was not the common gaol of the county—the power being given by 32 & 33 Vict. c. 31 § 33 Statutes of Canada.—*Birch v. Perkins*. 327.

*Insolvent Act of 1869—Privileged creditor—Arrears of wages—Daily laborer—Where servant leaves employ of insolvent before assignment—Waiver—Section 67.*

C assigned under the Insolvent Act of 1869, on the 14th November, 1872, being indebted at the time to N. in the sum of \$945. Part of this sum was for wages due the claimant as a shipwright in the employ of the insolvent at daily wages. The whole was settled with the insolvent on the 28th October, 1872, the claimant taking four notes payable in 1, 3, 6 and 9 months respectively. The last work done by the claimant was on the 8th August, 1872, after which time he continued boarding the insolvent's men up to the 24th October. The claimant swore that the sole reason he left his employ was because he would not pay him.

**Held,** that, in the position in which the claimant placed himself, he could not be considered in the employ of the insolvent, and was not entitled to be preferred as a privileged creditor under the 67th section of the Act.—*Ex parte Napier*. 300.

*Frauds (Statute of)—Contract—Uncertainty.*

The defendant undertook to give or procure for the plaintiff a situation as clerk or book-keeper at \$1000 a year, in consideration for which the plaintiff was, for a certain sum agreed on, to give the defendant a deed of his interest in certain lands and to "use his influence with the other heirs" to procure deeds to the defendant. In an action brought against the defendant for breach of this agreement.

**Held, 1.** That the contract was not void for uncertainty.

**2.** That it was not void under the Statute of Frauds, as being a contract not to be performed within a year.—*Bennett v. Peck*. 316.

*Insolvent Act of 1869, sec. 50—Remedy against Assignee.*

The holder of a mortgage on personal property belonging to an insolvent having replevied it from the assignee,

**Held,** that the remedy by action was taken away by section 50 of the Insolvent Act, and that he should have applied to the Judge for an order under that section.

In a case of compulsory liquidation, the judgment of the County Court Judge adjudicating the party insolvent is *prima facie* evidence of his being a trader.—*McGuirk v. McLeod*. 323.

*Insolvent Act of 1869—Claim—Contestation of—Pleadings—Unpaid cheques—Notice of dishonour—Necessity of alleging damage for want of*

In resisting a claim filed against an insolvent's estate on cheques drawn by the insolvent and unpaid for want of funds, on the ground of want of presentment and notice, it is necessary to allege and show that, by reason of want of notice, the insolvent or his estate had sustained loss or injury.—*In re Oulton*. 333.

*Insolvent Act of 1869—Arrest after assignment by creditor who has proved claim—Discharge—Whether Court will set aside writ.*

Where an insolvent has been arrested after assignment by a creditor who has filed his claim under the Act and taken part in the proceedings, the Court will not set aside the writ and discharge the defendant out of custody, but will leave him to his relief under the 145th section of the Act, by application to the County Court Judge.—*Hegan v. Jones*. 290.

*Replevin—Distress for rent—Where tenant has assigned under Insolvent Act of 1869—Whether right of distress taken away.*

The estate of M. was put in compulsory liquidation under the Insolvent Act of 1869, and the plaintiff, who was the official assignee, took charge of the estate, including goods on the premises of the defendant, McGuirk, then held by M. as his tenant. A year's rent being in arrear, while the goods were still on the premises, though in the possession of the plaintiff as guardian under the Act, McGuirk distrained for rent.

**Held,** in an action of replevin brought by the plaintiff to recover possession of the goods, per Ritchie, C. J., and Allen, Weldon and Fisher, J. J. (Wetmore, J., *dissentiente*) that the landlord's common law remedy by distress is not taken away by the Insolvent Act of 1869.

Per Wetmore, J. That the landlord's right to a year's rent, to which his preferential lien is limited by the 81st section, can only be enforced by a summary application to a court or Judge under the 50th section of the Act.

**Quære.** Whether the clause in the 81st section of the Insolvent Act of 1869 restricting a landlord's preferential lien for rent to one year is not *ultra vires* the Dominion Parliament.—*McLeod v. McGuirk*. 248.



## Digest—New Brunswick.

*Replevin—Non tenuit—What can be given in evidence under plea of—Fraudulent conveyance—Landlord and tenant—Distress.*

It is competent for an assignee of an insolvent, in an action brought to replevy goods distrained for rent, to show, under the plea of *non tenuit*, that the premises occupied by the insolvent, and for which the defendant claims rent, were conveyed by the insolvent to defendant, to defraud his creditors, and such fraud being shown, the relation of landlord and tenant would not exist between them so as to give effect to the conveyance as against the creditors.—*McLeod v. McQuirk*. 288.

*Trustee—Revocation of authority of—Where binding arrangement made before revocation.*

F. died in the latter part of August, 1870, intestate, having his life insured in the sum of \$6000, "to be paid to E. (the plaintiff) his wife, if she should survive him; if not, to the children of the assured, or their legal representatives." On the 13th September following, plaintiff gave defendant, in writing, authority to collect the insurance and use it for the purpose of paying the debts of her husband. Subsequently, on the 16th September, defendant not being satisfied with the previous authority, procured a deed poll, whereby the plaintiff assigned the policies to him in trust for payment of the balance of the debts due by F., or for the purchase of such debts, and for the payment of the remainder to plaintiff. Two creditors were about taking steps to attach the policies in the United States, when, being informed by the defendant of the assignment, they, at his request, took no further proceedings. On the 30th March, 1872, and before defendant had paid over any money in pursuance of the deed, plaintiff signed a revocation, and, through her solicitor, made a demand from the defendant of the amount received on the policies. Notwithstanding this, defendant distributed among the creditors what was necessary to discharge their claims. The plaintiff having sued defendant for the whole sum received from the Insurance Company,

*Held*, 1. That it was competent for the plaintiff to revoke the authority given to defendant so long as he had neither parted with the fund or entered into any binding obligation with the parties to whom the money was to be paid.

2. That, as there was no debt due from plaintiff to the creditors of her husband, nor any obligation on her part to discharge his indebtedness, the fact of defendant having communicated to F.'s creditors the authority to receive and pay over the money would not be sufficient to prevent the plaintiff from changing its disposition by revoking the authority.

3. (Per Ritchie, C. J., and Allen and Weldon, J. J., Wetmore, J., *dissentiente*.) That the engagement entered into with the

creditors who were about attaching the policies was binding, and the plaintiff could not recover the amounts paid over to them.—*Frost v. Kerr*. 388.

*Will—Construction of—Life estate—Power—Covenant—Estoppel—Evidence—Joinder.*

K. devised as follows: "I give to my dear wife M. the possession, use and occupation of my moiety of the house in which I now reside, and also my moiety of the upland marsh \* \* \* and also all the plate, linen, goods, chattels and effects, together with all the household furniture of which I shall be possessed at the time of my decease; as also the rents and profits of all my other personal and real estate whatsoever, whether consisting of land, tenements, goods, chattels, debts, moneys or choses in action, including all that I may own in the world at the time of my death, for the support and maintenance of herself and such of my younger children as shall be living with her and still unmarried. \* \* \* It is further my will that if the rents and profits of my real and personal estate be not sufficient for the maintenance and support of my said wife and younger children, she may from time to time employ such of the principal as may be necessary for that purpose. It is also my will, and I hereby direct that whatever of my real or personal estate may remain after the death of my said wife, and which has not been previously otherwise disposed of in this will, shall be equally divided, share and share alike, between my children."

After the testator's death, M. leased a portion of the property to the defendant, under a demise containing various covenants, for a term which extended beyond M.'s life. M. having died, the defendant refused to perform his covenants, alleging that the lease was determined by her death. In an action brought by the children of K., the remaindermen named in the will,

*Held*, 1. That M. only took a life estate under the will.

2. That she had the power of sale both of the real and personal estate, and, as included in this, also the power to lease.

3. That while it was open to the defendant to show that M. had only a life estate, by accepting the lease from her, and entering under it, and continuing in possession of the property, he was estopped from disputing that she had title to lease, either because the will did not authorize a lease under any circumstances, or because the power was only to be exercised in case the rents and profits of the property were insufficient for the maintenance of the family.

4. That in an action for rent which accrued due, or for any cause of action which arose after one of the remaindermen conveyed away his interest, he should not be a party.

Evidence of Commissioners of Sewers appointed under Act of Assembly, acting in that capacity, is *prima facie* sufficient.—*Knapp v. King*. 309.

## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

Some of our exchanges have adverted to the friendly passage at arms between the *Albany Law Journal* and ourselves with the observation that the solution of the difficulty between us hinges on the question whether "judicial" should be spelled with a capital letter, or "Her Majesty the Queen" with small initials. The idea of a "solution hinging on a question" is a striking figure of rhetoric, and is borrowed from a former Lord Dundreary of whom it was written :

"As thou wouldst say, my guide and leader,  
In these gay metaphoric fringes :)  
I must embark into the features,  
On which this question chiefly hinges."

"The last time I met Joaquin Miller, the American poet," says the London correspondent of a contemporary, "he spoke of himself as 'Judge' Miller. I expressed my delight and surprise. I had been unaware of his judicial dignities. Indeed, I did not even suspect that he knew any law. Upon my expressing my surprise, he replied calmly—'Yes, sir, for four years I administered law in Oregon—with the help of one law-book and two six-shooters.'" We suppose this one law-book was the immortal commentaries of Judge Blackstone. For does not a compatriot of the poet (who is also a poet) laud the great English legist, thus :

"Where shall we look but to the great Creator,  
For one superior to our Commentator?"

The *English Law Journal*, after giving an account of a curious will of one Signor Ponti, containing various complex clauses which would probably result in the estate finding its way into the pockets of the lawyers, thus touchingly comments upon that happy finale : "After all, there is nothing to deplore or be ashamed of in these solutions of embarrassing wills, for it is certain that the proper support of the profession is a good thing, whereas the general advance of the human race by means of £150 prizes to essay writers, or travellers, or mechanical contrivers, is an absurd and impossible object. Besides this, we must remember that no testator since the foundation of the world has ever bequeathed anything directly to the lawyers, and therefore they are justified in the indirect reception of some small share of the wealth of dead men. We do not know whether these views are shared by our learned brethren

in Italy, but we have no reason to imagine that they are less eager to promote the prosperity of their profession than the counsel or the solicitors who practice in the Probate Court or the High Court of Chancery."

Dr. Franklin thought that judges ought to be appointed by the lawyers, for, added he, in Scotland, where this practice prevails, they always select the ablest member of the profession, in order to get rid of him and share his practice themselves.—*Albany Law Journal*.

During the trial of a rather "demoralized" looking individual in Buffalo, not long since, one of the "lookers-on" at the bar, turning to another, and calling his attention to the jury, said, "How lucky it was that such men were created, for, without them, how could the benignant provisions of our glorious constitution be carried out, which guarantee to every man the right to be tried by his peers."

Somewhat better than this was the answer of a prisoner's counsel to the remark of the judge, that "the court and jury think the prisoner a knave and a fool." "The prisoner wishes me to say," responded the counsel, "that he is perfectly satisfied—he has been tried by his peers."—*ib.*

Curran used to say (and we commend the saying to the careful consideration of advocates): "When I cannot talk sense I talk metaphor." Kenyon must have been doing the same thing when he once addressed the Bench : "Your lordships perceive that we stand here as our grandmother's administrator *de bonis non* ; and really, my lords, it does strike me that it would be a monstrous thing to say that a party can now come in, in the very teeth of an Act of Parliament, and actually *turn us round*, under color of *hanging us upon the foot of a contract made behind our backs*."—*ib.*

A physician reproaching a lawyer with what Mr. Bentham would, perhaps, have called the "uncognoscibility" of legal nomenclature, said : "Now, for example, I never could comprehend what you lawyers mean by *docking an entail*." "My dear doctor," replied the lawyer, "I don't wonder at it; but I will explain; it is what your profession never consent to—*suffering a recovery*."—*ib.*

## LAW SOCIETY—TRINITY TERM, 1874.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, TRINITY TERM, 38TH VICTORIA.

**DURING** this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

ANGUS M. MACDONALD.  
FREDERICK ST. JOHN.  
JOHN ROSS.  
DONALD GREENFIELD McDONELL.  
DAVID HILL WATT.  
JAMES PARKES.  
THOMAS B. BROWNING.  
JOHN RICE McLAURIN (admitted and called.)  
JOHN WRIGHT, under special Act " "

And the following gentlemen obtained Certificates of Fitness:

JOHN BRUCE.  
JAMES PARKES.  
DAVID HILL WATT.  
RICHARD DULMAGE.  
JOHN ROSS.  
GEORGE B. PHILIP.  
FREDERICK ST. JOHN.  
THOMAS B. BROWNING.  
GEORGE R. HOWARD.

And on Tuesday, the 25th of August, the following gentlemen were admitted into the Society as Students-at-Law:

*University Class.*

CHARLES WESLEY PETERSON  
JOHN ENGLISH.  
GEORGE WILLIAM HEWITT.  
DUNCAN McTAVISH.  
DONALD MALCOLM McINTYRE.  
THOMAS GIBBS BLACKSTOCK.  
WILLIAM E. HODGINS.  
FREDERICK FIMLOTT BETTS.  
ALFRED HENRY MARSH.

*Junior Class.*

ALEXANDER JACKSON.  
HENRY P. SHEPPARD.  
HORACE COMFORT.  
RAYARD E. SPARHAM.  
ARCHIBALD A. McNABB.  
WILLIAM SWATZIE.  
ALBERT O. JEFFERY.  
WILLIAM F. MORPHY.  
HAMILTON INGERHOLL.  
ALBERT JOHN MCGREGOR.  
ROBERT D. STORY.  
DENIS J. DOWNEY.  
ALFRED CARES.  
ALEXANDER V. McCLENDONHAM.  
CHARLES E. FREEMAN.  
JOHN HODGINS.  
FREDERICK MURPHY.  
GEORGE W. HATTON.  
MARTIN SCOTT FRASER.  
FREDERICK W. A. G. HAULTAIN.  
WILLIAM PATTISON.  
RODNERICK A. MATHESON.  
CHARLES E. S. RADCLIFF.

*Articled Clerks.*  
PETER J. M. ANDERSON.  
JOHN H. SCODGALL.

*Ordered,* That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes, Book 3; Virgil, *Aeneid*, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. 1., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. 1., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

TREASURER

## DIARY—CONTENTS—EDITORIAL ITEMS—BLUNDERS IN THE STATUTES.

## DIARY FOR DECEMBER.

1. Tues..N.T.D., Q.B., P.D., C.P. Last d. for not. trial Co. Ct. Clks. (exc. Co. Clks.) ret.resi't ratep'rs (Mun. Act. s. 189.)
2. Wed..Open Day, Q.B. New Trial Day, C.P.
3. Thurs..Re-h. T. in Chy. begins. Open Day, Q.B. and C.P., Con. Stat. came into force, 1859.
4. Fri..N.T.D., Q.B. Open D., C.P. Last Day but one for cert.
5. Sat...Michaelmas Term ends. Last day to give notice for Call.
6. SUN..2nd Sunday in Advent.
8. Tues..Gen. Sess. and Co. Ct. sittings in each Co. begin. Last day for J.P.'s to ret. convictions to Clk. of Peace (32 V. Ont. c. 6. s. 9 (4); 32-33 V. c. 31, s. 76; 33 V. c. 27, s. 3.
13. SUN..3rd Sunday in Advent.
14. Mon..Prince Albert died, 1861. Collectors to return rolls, unless time extended. Councils may disfranchise for Municipal elections if taxes not paid by this date.
19. Sat...Last day to give notice of primary examination.
20. SUN..4th Sunday in Advent.
21. Mon..St. Thomas. Shortest day.
24. Thurs..Christmas Vacation in Chancery begins.
25. Fri..Christmas Day. First observed, 98.
26. Sat...Upper Canada erected into a Province, 1791.
27. SUN..Sunday after Christmas. Innocents.
28. Mon..Nomination of Mayor, Ald. Reeves, Dep. Reeves and Councillors (Mun. Act. ss. 102-105.)
31. Tues..Last day for Clerk of Peace to deposit Jurors' book in Crown office (C.S.U.C. c. 31, s. 29.)

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# THE Canada Law Journal.

Toronto, December, 1874.

We are glad to see that the Government of Ontario seems favorably disposed to the appointment of short-hand reporters to take down evidence at trials before the judges. There is no reason why we should be behind the age in this matter. The example has already been set in the west wing of Osgoode Hall, and it is said to be a great convenience to the Bench and Bar.

We publish reports of two equity cases as to staying proceedings pending rehearing, as these cases often referred to, but have not hitherto been reported, we have been at some pains to give them to our readers. *Stovel v. Coles*, decided some two years ago by Mr. Taylor, will not be found elsewhere, *Campbell v. Edwards*, decided by the Chancellor in June last, will appear, we presume, in due course, in the "orthodox" reports.

## BLUNDERS IN THE STATUTES.

The gentlemen engaged in consolidating the laws of Ontario will have plenty of opportunities for improving upon the performances of the Local Legislature of Ontario, which maintains the long-established reputation of parliaments for making extraordinary blunders. It was Lord Coke who said that all things were possible for parliament, except to turn a man into a woman, and *vice versa*. The last Ontario House have been occupying themselves in stamping out acts which had been extinguished some time before—wasting their strength—in slaying the dead. For instance they propose to re-

## CONCERNING VACATION—ADVERTISEMENTS FOR TENDERS.

peal part of section 52 of the Error and Appeal Act (C. S. U. C., cap., 13), as will appear from the schedule A appended to 37 Vict., cap. 7, Ont. But the part they attempt to deal with had already been deleted by 32 Vict., c. 24, sec. 7, Ont. Again in 37 Vict., c. 24, sec. 4, certain words are added to C. S. U. C., c. 49, sec. 85, (the act relating to Joint Stock Road Companies). But it appears that this section 85 was repealed and a new section (containing different provisions) substituted by 35 Vict., cap. 33, s. 1. This jumble makes it rather difficult to know what the law is. However, it is well-known that the business of the Courts is to find out what the Legislature means.

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CONCERNING VACATION.

Business men in England are falling foul of the long vacation there, and agitating for its abolition. In this it is not desirable that they should succeed. The best interests both of the bench and the bar demand that there should be a time for rest and recuperation for the members of the hard-worked and brain-racked profession of the law. It may be that the long vacation in England is too long and should be somewhat shortened, but it would be most injudicious to do away with it altogether.

In this country a temporary release from work is all the more necessary on account of the exhausting heat of summer. And indeed the seasons would seem to have somewhat changed since the limits of the vacation in this Province were first fixed. We have heard it suggested that instead of having it from the 1st of July to the 21st of August, it would be better if it were to run from the 15th of July to the 15th of September. Two months would be none too long, and such a two months as are indicated would it is said, embrace that part of the hot weather, which is hardest to be borne—

that part namely in the beginning of September which now destroys all possible beneficial results of previous sojourns at sea-side and lake-side..

The large number of lawyers who have died from over-work, even under the present system, is quite enough to stay the hand of the most rigid reformer, before he sets about abolishing vacation. Among the many eminent names that might be mentioned we can recall those of Sir S. Romilly, Sir W. Follett, Sir John Rolt, Sir G. M. Giffard, Sir John Wickens and Mr. Justice Willes (one of the few judges who did not accept the honor of knighthood.) A prominent English periodical has aptly characterized the vacation as a period of relaxation not only necessary to the individual, but in the long run advantageous to the public.

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ADVERTISEMENTS FOR TENDERS.

In these days of high rates in newspaper advertising, it pains the economic mind to see how wantonly architects and others throw away money by persisting in informing the contracting public that "*the lowest or any tender will not be necessarily accepted.*" These words are mere surplusage and do not avoid any liability supposed to be incurred by inviting tenders to be sent in. The point was expressly raised for decision in *Spencer v. Harding*, 39 L. J. C. P. N. S., 332, a case which arose out of a stock in trade that had been exposed for sale by tender. The time when all tenders would be received and opened was also stated. The plaintiff made a tender, which was alleged to be the highest, and brought an action because it was not accepted. The Court observed that there was no engagement in the advertisement to accept the highest bidder. There was nothing more than a public proclamation that the defendant desired to have

## REAL PROPERTY LIMITATION.

offers made for the stock, and so the action failed. We think we have observed this unnecessary clause about not accepting tenders in advertisements which have been settled under the supervision of Masters of the Court of Chancery. It would be well in this matter to observe the direction of the late Chancellor Vankoughnet, and shorten the advertisement as much as possible.

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**REAL PROPERTY LIMITATION.**

The Legislature in England has taken a step in changing the period of statutory limitation in regard to land which should have long since been initiated in this country. Here, where the rapid growth of village, town and city, the sudden affluence of individuals, the simplicity of titles to real estate, and the frequent transfer of land as an article of commerce, work more radical and extensive changes in half-a-dozen years, than are to be found during a quarter of a century in what we speak of as "The Old Country," here, surely, rather than in England might we have expected to find the passage of an "Act for the *further* limitation of actions and suits relating to real property." Such, however, is the title of an Act passed in England in the last session of the Imperial Parliament, (37 and 38 Vict., cap. 57), although not to come into force till January, 1879.

One of the chief amendments of the law effected by this Statute is the allowance of a period of twelve years for making an entry or distress or bringing an action for the recovery of lands, instead of the present term of twenty years. In cases of disability, the period of ten years from the termination of such disability or death, is shortened to six years. It is further provided that the time limited for making entries, &c., shall in no case be extended by reason of absence beyond seas. As to this alteration we have an-

ticipated English legislation, by the Act passed in 25th Vict., cap. 20, which enacted that no additional time should be given to absentees by reason of their absence from the jurisdiction. This Statute was commented on in *Low v. Morrison*, 14 Gr. 195, and Vankoughnet C. seemed to think that the change was rather too hastily introduced, as only one year was given to absentees within which to avail themselves of an existing disability. By the length of time given in England, before the Statute in question becomes operative, pains have been taken to modify as much as possible the effect of an *ex post facto* law.

Among the other provisions of the English Statute we may notice that the extreme period of limitation is to be thirty instead of forty years. Successive disabilities are provided for, but twelve and six years are respectively substituted for twenty and ten years in the previous Act.

Following this example we observe that the Attorney-General has introduced a bill this session to shorten the periods of limitation in Ontario. Every reasonable facility should be given for the sale and transfer of landed property in a new country like this, and no measure can have a more beneficial tendency to secure such a result than a proper curtailment of the present periods of statutory limitation.

No doubt considerations may be urged against the policy of this change. Persons holding wild lands for speculative purposes will probably object to an act which will cause them to give a little more attention to the utilization of their property. Persons whose maxim is *ne quieta marre* (anglice "let well alone"), will fail to see any sufficient reason for disturbing the time-honoured period of twenty years proscription. But twenty years now a days is well-nigh a life-time, and any one who allows another (say a squatter), to remain in undisturbed pos-

## FOX'S LIBEL ACT.

session for that length of time can hardly bring himself within the maxim as to the vigilant whom the law assists. There may be possible hardships in the operation of the law as to minors, yet if parents choose to die and leave their property uncared for, it should not be matter of surprise if the state is equally heedless. But, after all, the true remedy for the protection of infants is to provide for the appointment of a class of public functionaries who should have the supervision of intestate estates. It may be questioned (though perhaps we may be set down as heartless monsters for breathing such a thing) whether infants may not be classed as a "public nuisance," looking at the way their interests are protected to the detriment of public business.

## FOX'S LIBEL ACT.

Though the act which declares the rule of law to be that on the trial of an indictment for libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter put in issue, and shall not be required by the judge to find the defendant guilty, merely on proof of the publication of the alleged libel, and of the sense ascribed to it by the indictment, was introduced by Mr. Fox, and is always known as "Fox's Libel Act," yet the merit of bringing about that measure is without doubt mainly due to two great lawyers, Lord Camden and Lord Erskine.

Lord Chancellor Camden was one of those admirable men in whose life, public or private, calumny itself could find no flaw. Although he was the son of a distinguished lawyer, Sir John Pratt, the successor of Lord Macclesfield as Chief Justice of the King's Bench, and was gifted with rare talents and industry, he passed so many years of his professional life in briefless obscurity, that at one time he seriously contemplated entering the Church. Hap-

pily for the profession, and for his own fame, he was dissuaded from this step, and induced once more to "ride the circuit" which he had travelled fruitlessly for eight or nine years. On this occasion a friendly stratagem procured him an opportunity for displaying his powers, which he used to such advantage that a respectable practice immediately flowed in upon him. He first attracted public attention in a prosecution for libel, *Rex v. Owen*, when he boldly asserted the then startling doctrine that, by the law of England, the judge had no right to direct the jury to confine their verdict to the question of publication, and to the correctness of the innuendos, leaving the bench to decide whether the matter itself was libellous.

This was in 1752, and for forty years, Pratt consistently and earnestly maintained the doctrine he had then, against the entire current of legal opinion, dared to assert. In 1792, after having enjoyed the highest honours of his profession, and gained for himself the reverence of the people as the guardian of their rights, and of the bar as a profound and upright judge, he had the satisfaction of conducting in its passage through the House of Lords, the bill which declared the law to be what he had always contended it was. This was the last public service he performed.

At this day the arguments so frequently used by Lord Camden seem to us unanswerable. "A man may kill another in his own defence, or under various circumstances, which render the killing no murder. How are these things to be explained?—by the circumstances of the case. What is the ruling principle?—the intention of the party. Who decides on the intention of the party? The judge? No! the jury. So the jury are allowed to judge of the intention upon an indictment for murder, and not upon an indictment for libel!! The jury might as well be deprived of the power of judging

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of the facts of *publication*, for that likewise depends upon the *intention*. What is the oath of the jury? Well and truly to try the *issue joined*—which is the plea of *not guilty* to the whole charge." And yet Lord Mansfield never swerved from his opinion that the judge alone was concerned with the question, whether the writing complained of was libellous. He maintained this to be the law in every case, in his long career, where the question arose before him, and when Erskine united all his eloquence and logic in one impetuous stream against this dangerous doctrine, he put him aside, to use the advocate's own words, "as you do a child when it is lisping its prattle out of season." Lord Eldon too, stoutly maintained the same opinion, and begged the House of Commons, in the debate on Fox's Act, not to act with precipitation in unsettling a rule which had been regarded as law for a century. Thurlow, Kenyon, Buller, in truth all the lawyers of that day, great or little, concurred in holding obstinately that the jury had no business to meddle with the circumstances which make the publication criminal or innocent, and looked upon the Libel Act as a dangerous innovation, prophesying the usual doleful consequences to the constitution if it should become law. Amongst the whole profession Camden and Erskine were alone found to raise their voices against the prevailing opinion.

History furnishes us with an impressive scene in the debate in the House of Lords which decided the fate of Fox's Act. It was the last public question in which the venerable Camden was to take part. He was approaching four score years, and he rose to address the House slowly and painfully, leaning upon a staff for support. "I thought," he said, "I thought never to have troubled your Lordships more. The hand of age is upon me, and I have for some time felt myself unable to take an active part in your deliberations. On

the present occasion, however, I consider myself as particularly, or rather as personally, bound to address you—and probably for the last time. My opinion on the subject has long been known; it is upon record: it lies upon your lordship's table: I shall retain it, and I trust I have yet strength to demonstrate that it is consonant to law and the constitution." We are told that his voice, which had been at first low and tremulous, grew firm and loud, and all his physical as well as his mental powers seemed animated and revived. He then stated, with his wonted precision, what the true question was, and he argued it with greater spirit than ever. Lord Thurlow, disappointed in his hope that the bill would be defeated, did his best to damage it in committee by a nullifying amendment. But Camden refused to allow any qualifications, whereupon the following dialogue ensued:

Lord Chancellor: "I trust the noble and learned Lord will agree to a clause being added to the bill, which he will see is indispensably necessary to do equal justice between the public and those prosecuted for libels. This clause will authorize the granting of a new trial, if the Court should be dissatisfied with a verdict given for the defendant."

Earl Camden: "What! after a verdict of acquittal?"

Lord Chancellor: "Yes!"

Earl Camden: "No, I thank you!"

These were the last words Lord Camden ever uttered in public.

But great as was the influence of Camden's character and labours in securing the establishment of the law of libel on a rational basis, it is doubtful whether he would have lived to see the triumph of his opinions, had he not found a powerful ally in Erskine. Erskine's efforts were more splendid and striking, and being enacted on a more public stage, forced upon the mind of the people and of parliament the necessity for legislative



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action. It was in the Dean of St. Asaph's case that Erskine first had occasion to contend for the principle, that it is the province of the jury, on an indictment for libel, as in other criminal cases, to bring in a verdict upon the whole matter in issue. Buller was the judge, whose pupil Erskine had been, and for whom he entertained a sincere feeling of reverence. This, however, did not prevent a fierce altercation between bench and bar, when the jury, eager to reward the eloquence of the advocate by a complete acquittal, brought in a verdict of guilty of publishing *only*. The last word Justice Buller refused to record, insisting that the jury did not understand their verdict.

Erskine: "The jury do understand their verdict."

Buller, J.: "Sir, I will not be interrupted."

Erskine: "I stand here as an advocate for a brother citizen, and I desire that the word '*only*' shall be recorded."

Buller, J.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."

Erskine: "YOUR LORDSHIP MAY PROCEED IN WHAT MANNER YOU THINK FIT; I KNOW MY DUTY AS WELL AS YOUR LORDSHIP KNOWS YOURS. I SHALL NOT ALTER MY CONDUCT."

A verdict of "guilty of publishing, but whether a libel or not, we do not find," having been at length brought in, Erskine afterwards moved for a new trial on the ground of misdirection. This he did with no hope of success, but to resist what he thought to be an illegal and unjustifiable precedent, and to call public attention to it. Fox often declared his argument on this occasion to be, in his opinion, the finest piece of reasoning in the English language, though the judges of the King's Bench were unmoved by it, and Lord Mansfield dismissed the whole question with

a doggerel rhyme. The judgment was arrested on another ground, but the judges of England had, as far as lay in their power, placed the fatal doctrine that *libel or no libel* was a pure question of law, and one with which juries had no concern, beyond the reach of further danger. The result of the case was, however, far different to what it seemed likely to be. Instead of establishing a rule of law, which, like the rule in Shelley's case, would endure impregnable to all the assaults of reason, it caused so much alarm in the public mind that Fox's Act was called for, which forever subverted the doctrine by *declaring* the law to be the reverse of that doctrine. It fell to Erskine, who had made such a gallant and glorious struggle in the cause, to support the bill as Mr. Fox's seconder.

It will gratify equity lawyers to know that the clause in the act requiring the judge, according to his discretion, to give his opinion on the whole matter in issue, which has caused so much trouble, and in some cases has nullified the effect of the act, was the handiwork of Lord Eldon. "Mr. Fox's Act," says Lord Campbell, "only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious and atrocious murder!'. For a considerable time after the Act passed against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say, 'As the Legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'"

In our own day judges are for the most part reconciled to the necessity of leaving the whole issue to the jury, and seldom attempt to diminish their privileges by such a direction as that just

## LAW SOCIETY—TESTAMENTARY POWERS OF SALE.

mentioned. Seditious libels, to which Fox's Act was principally directed, are unknown to us, and no judge is likely to be led astray by an excessive reverence for royal prerogative or fear for the stability of government. Still prosecutions for libel at the instance of the Crown, though happily rare, have occurred amongst us. In such cases it behooves the judge to act circumspectly, lest the suspicion may be aroused that the baleful influence of party feeling has invaded even the bench, and that the spirit of the Act has been overridden by a specious adherence to the letter.

## LAW SOCIETY.

MICHAELMAS TERM, 1874.

There seems to have been a decided falling off this Term in the number of those who are sent forth as competent on behalf of their clients to "plead and be impleaded" in Her Majesty's Courts. The various examinations resulted as follows:

## CALLS TO THE BAR.

Mr. Jas. H. Coyne, without an oral, having obtained over three-fourths the total number of marks, and Messrs. M. E. O'Brien, W. H. Watson, W. H. McFadden and N. F. Paterson, also without an oral, being already attorneys.

## ATTORNEYS ADMITTED.

Mr. Jas. H. Coyne, (without an oral), and Messrs. W. H. McFadden, M. E. O'Brien, G. H. Watson, A. D. Cameron, James Pearson, W. D. Foss, H. E. Henderson, A. R. Creelman and H. W. Denaley.

## INTERMEDIATE EXAMINATIONS.

FIRST—Messrs. J. L. Whiting, F. B. Robertson, James Fullerton, J. R. Whiteside, H. East, F. D. Cowper and Walter Barwick, (without an oral.) Messrs. J. J. Manning, H. P. Milligan, H. Vivian, J. J. Wadsworth, J. W. Robinson, J. Lappan, A. H. Marsh, C. F.

Smith, R. Gourlay, T. J. Decatur, F. H. Kennin, (after an oral examination.)

SECOND.—Messrs. John T. Wood, A. Monkman, C. J. Holman, M. Wilson, J. H. Scott, J. C. Haslett, A. C. Killam, R. G. Cox and C. C. Robinson, (without an oral.) Messrs. F. Going, E. J. Reynolds, A. Ogden, A. E. Smythe, James Leitch, S. C. Locke and Thomas Hodgkin.

## SCHOLARSHIP EXAMINATIONS.

These examinations resulted as follows:

FIRST YEAR—T. P. Galt, 263 marks.

SECOND—D. E. Thompson, 288 marks; James Fullerton, 263 marks; (the other students not classed being below the minimum.

THIRD—J. W. Gordon, 234 marks. Maximum, 320, and minimum, 214, in first, second and third years.

FOURTH—H. J. Scott, 350 marks. Maximum, 400; minimum, 300.

The examinations of Mr. Scott, for the fourth year (though only a "three year" man) and Mr. Thompson in the second year, were remarkably good, both obtaining a very high percentage, and this is also the first time for four years that the required standard in the fourth year has been reached.

## SELECTIONS.

## TESTAMENTARY POWERS OF SALE.

(Continued from page 308.)

In Massachusetts, at least, the law should be clear on this point, if decisions can make it so. It has been here held from the first that an executor's or administrator's function, as such, includes the performance of duties relating to the payment of legacies, whether directly or in trust, even if that trust extends over the lifetime of the legatee. The decisions, some of which go to a great length, and may be considered as modified by later authorities, nevertheless clearly show that an executor is bound to perform a testamentary trust, and, therefore, that he is *quoad hoc* a trustee; and it is a legitimate consequence of this that all powers

## TESTAMENTARY POWERS OF SALE.

given him to carry out these trusts will as well survive to him under the name of trustee as of executor. Thus, in *Farewell v. Jacobs*,\* where there was a direction in a will that the executor should give a reasonable support to the testator's father during his life, it was held that this was a legacy, and a duty to be discharged by the executor as such, and, therefore, by an administrator *cum testamento annexo*, and that an action lay against the latter in behalf of the legatee. The court, it is true, say, in the course of their opinion, "that the duties of an executor resulting from the nature of his office, and charged upon him as executor, devolve upon an administrator *cum testamento annexo*, where the authority is not necessarily connected with a personal trust or confidence reposed in him by the testator." But it is very noticeable that they should hold that the duty in this case was of that character,—that is, that the executor took as such, and not as a special trustee. In *Saunderson v. Stearnes*,† a similar state of facts existed; and upon the claim being made by the life annuitant under the will, that the *corpus* of the fund vested in her, because there was no one named as trustee to hold it during her life, the court say: "The supposed difficulty does not occur; for there is a trustee, if not named, yet arising by a plain implication from the words of the bequest, who is entitled to retain the legacy during the life of the plaintiff. The executor named in the will, or any person who may, by law, become entrusted with the execution of it, is the trustee of the legacy during the life of the plaintiff;" and a similar decision was made in *Ellis v. Essex Bridge Co.*‡ In the case of *Hall v. Cushing*,§ the action was brought on the executor's probate bond for not investing a legacy given by the will to children at majority, they, meanwhile, to receive the interest; and the defence was that he was not bound as executor, but as trustee, to invest, and that there was, therefore, no breach of his executor's bond. It was strenuously urged that his executorial character ended with the payment of debts and direct legacies and could not attach to special trusts; and that this

trust to invest was not one which inured to him as executor, but as special trustee, indicating a confidence reposed in him by the testator; and that neither the duty nor trust could pass to an administrator *cum testamento annexo*. But the court held otherwise; and, as to the confidential trust alleged, said "that the direction to invest was intended for the security and productive value of the assets, and would be binding on any one intrusted with the execution of the will." This case, therefore, takes the one step farther in advance, that not merely will the court fasten upon the executor or administrator *cum testamento annexo* the character of a permanent trustee of trusts not relating to the immediate settlement of the estate, on the ground of enforcing the payment of a legacy, but that this will draw with it the right to the powers given by the testator for the purpose of carrying out such a payment, and the compulsory exercise thereof, wherever the court can see anything of the nature of a trust to have them employed. Indeed, the court had already, though somewhat indirectly, gone so far as to treat a power of sale of land as attaching to the executor as such, because the proceeds were to pay an annuity given by the will.\* In *Dorr v. Wainwright*,† there was a general legacy for life, with a remainder over of certain personal estate. One executor, who, by the rule laid down in the preceding cases, was as such clearly trustee for the lives of two legatees, applied to the Probate Court to be relieved from his executorial bond, and to be allowed to give bond as trustee. It is to be remarked also, that a power of sale of realty, for the purpose of raising the money for these legacies, was given to the executor. The Probate Court refused to grant his petition, and this was affirmed by the Supreme Court on appeal, on the ground that his bond as executor held him to the discharge of this trust; Shaw, C. J., saying, "The ground upon which the decision in the present case proceeds is, that where the executor does not renounce the trust, but on the contrary, declares that he is ready and desirous to execute it, . . . it was competent and proper for the Court of Probate to decline granting a new commission to the executor, as trustee, and taking new bonds,

\* 4 Mass. 634.

† 6 Mass. 37.

‡ 2 Pick. 243.

§ 9 Pick. 396.

\* *Prescott v. Pitts*, 9 Mass. 376.

† 13 Pick. 328.

## TESTAMENTARY POWERS OF SALE.

when such commission would have given no new authority to the executor," which was the case therefore here. It seems to follow also that the executor as such could have executed the power of sale given, and that it would therefore have vested even in the administrator *cum testamento annexo*. The same character of trustee by implication was held to attach to the executor in the later cases of *Going v. Emery*\* and *Nash v. Cutler*.† In *Toune v. Ammidown*‡ a money legacy was given to testator's granddaughter upon her marriage, otherwise she to receive only the interest during her life, and the principal to go to other parties at her decease. The executors, on settling their first account, were directed to retain this fund in their hands for the use of the granddaughter; but, subsequently becoming insolvent, the sureties, on their administration bond, were forced to pay this amount to the legatees. To a bill brought by the sureties for reimbursement, it was contended, in defence, that they had paid in their own wrong; not being bound to pay the amount of the fund, because the duty was upon the executors as trustees, and no longer *qua* executors, after they had retained it as a special fund by order of the Probate Court. But the court say, "This position is not tenable. They were bound to execute this trust *qua* executors. The manner in which this sum was noticed in their joint account as executors was intended, not to exempt them from further liability to account and pay over, but to show that it was a sum not then to be called for, but to be retained for the purposes of the will. . . . It was their duty as executors to perform this trust . . . This point we now consider as settled by the authorities."§ The decision in *Nercomb v. Williams*|| is to the same effect. A. and B. were here appointed executors, and B. specially named as trustee of the residue for C. during his minority, with the duty meanwhile to keep the fund productively invested. B. declined this trust, but retained the fund, and subsequently became insolvent. Suit was brought upon A.'s bond, and prevailed, on the ground that, until A. separate-

ly qualified as trustee, the executors were charged with a general trust duty *qua* executors as to any fund in the nature of a legacy.

In *Brown v. Kelsey*\* a similar principle was applied. Here a money legacy was to be invested, and the income to go wholly to A. during her life, and on her death the principal to B. It was held a trust upon the executor, which he must assume, and that the principal could not be placed at once in the hands of A., though it was admitted that, after investment, the fund stood at the risk of the legatees. The trust duties of an executor seemed, therefore, something as tenaciously adhesive as was the fabled shirt of Nessus; and the decision in *Miller v. Congdon*,† that the mere mental determination, though actually made, of an executor to appropriate to himself, in the character of trustee, certain funds bequeathed in trust, but unaccompanied by any open and notorious act, would not discharge him as executor, falls well within the line of the cases already cited; and the case of *Dorr v. Wainwright*‡ is expressly affirmed. It had, however, been admitted in some cases since *Dorr v. Wainwright*, that one holding this double character of executor and trustee might relieve himself of responsibility in the former capacity by any open and notorious act indicative of that intention. This was intimated in *Hall v. Cushing*;§ and though the decision of *Dorr v. Wainwright* implies the contrary, yet the later doctrine was confirmed in *Nercomb v. Williams*|| and *Conkey v. Dickinson*.¶ It was said, in the former case, that any "authoritative and notorious act" would have this effect, and this seems to have been already followed in the case of *Prior v. Talbot*.\*\*

But even with this well recognized exception to the executor's liability, if he chooses to qualify as trustee, it still remains settled that as executor he is trustee for any testamentary purpose which the court construes as a legacy, taking the very extended meaning of that term, sanctioned by the decisions we have

\* 16 Pick. 107, 113.

† 19 Pick. 67, 70.

‡ 20 Pick. 535.

§ *Hall v. Cushing*; *Dorr v. Wainwright*, ante pp.

679, 680.

|| 9 Metc. 525.

\* 2 Cush. 243.

† 14 Gray, 114.

‡ *Ante*, p. 680.

§ *Ante*, p. 679.

|| 9 Metc. 525, 534.

¶ 13 Metc. 53.

\*\* 10 Cush. 1.

## TESTAMENTARY POWERS OF SALE.

mentioned. And it seems to make no difference whether he is called executor or trustee in connection with the particular trust imposed.\* Thus, in *Prior v. Talbot*,† Isaac N. Prior was appointed executor and trustee by the will, which required "the said trustee" to sell and "to divide and set apart one-third of the proceeds arising from such sale, . . . and having safely and prudently invested the same in his own name, to hold the same in trust to pay the income to said Roxana [the testator's widow] during her life, and after her death to hold the same upon the trusts to be thus distributed," &c. It was held that, notwithstanding this language and the duty charged, he held the fund as executor, and was chargeable as such until he qualified as trustee. In *Dascomb v. Davis*‡ the court would seem to imply that executors charged with the payment of similar legacies of personal property, and with the power and duty of managing the estate and effects "of the testator, and disposing of all his lands, &c., for the purposes before mentioned, at such time and in such manner as shall be most likely, in their judgment, to do exact justice to all my creditors, and to be for the greatest advantage of all concerned," had not merely a power, but an estate in possession; so that they could maintain an action of trespass *quare clausum* against an intruder, and which would, as an estate, of course, have passed to a single surviving executor. Whereas the same language in *Tainter v. Clark* was held to confer a mere discretionary power, to which this case stands therefore in direct opposition.

It seems, accordingly, to be clear, as we have already intimated, that if these trust duties attach to the executor as such, the powers coupled with them must equally attach so far as they are necessary to the discharge of these executorial duties, even if terms of special confidence or reliance in the trustee's discretion are found, and that this discretion is therefore exercisable by a single executor. It is true that in *Treadwell v. Cordis*,§ *Tainter v. Clark* is referred to with apparent approval; and it is said that the exercise of the power of sale in that case "was not necessary to the execution of

the will, or to the complete settlement of the estate in accordance with it." But it is submitted that such was not the fact, and that we have shown that the exercise of the power in that case was indispensable to such a settlement, and that, at most, the trustee's discretion extended to the selection of the parcel which he should sell.

It is, however, admitted in *Treadwell v. Cordis* that testamentary trusts are binding on the executor as such; and if it were not clear from the cases already considered that powers of sale attach of necessity to the executorial office where the proceeds are to satisfy such a trust, we think it will be apparent from the cases that follow. In the very elaborately considered case of *Shelton v. Homer*,\* the testator had given to his executors, "or those who should take upon themselves probate of the will," a power of sale. It was held that after two executors had qualified, and one subsequently resigned, the other could not execute the power. We shall have occasion to notice this case further on, in connection with the distinction taken between a resigning and a non-accepting executor; but it is sufficient here to remark that the power in this case was a bare power, and so declared by the court, there being no purpose directed for the disposition of the proceeds; and that it was therefore not coupled with a trust.†

In the case of *Gibbs v. Marsh*,‡ a power of sale was given by name to the testatrix's brother Walter, who had previously been appointed trustee of certain real estate, under several special trusts; and it was further provided that he, or any successor of his nominated by him to the trusts, might sell and re-invest as the *cestuis que trust* should direct and advise, or, in default of such advice and direction, *as the trustee or trustees should think most for their interest*. The trustee died without nominating a successor; and the Probate Court appointed a new trustee, whose conveyance of the premises was here in issue. The state of facts certainly disclose as distinct a confidence reposed in the trustee's discretion as in the case of *Tainter v. Clark*; in addition to which the trustee there was an executor, and a sale imperative for payment of debts and

\* *Newcomb v. Williams*, *ut sup.*

† *Ut sup.*

‡ 5 Metc. 535.

§ 5 Gray, 341, 359.

\* 5 Metc. 462.

† *Denne v. Judge*, 9 East, 288.

‡ 2 Metc. 243.

## TESTAMENTARY POWERS OF SALE.

legacies : and here, as it was contended, the appointee of the Court of Probate—under the statute of 1817, c. 190—could not succeed to such a discretion, so clearly limited to particular individuals ; that to hold this would be to abridge the authority which every owner of property has, to select individuals to manage it, and would transfer it to persons unknown to him ; that the power of sale was a naked authority, and rested on personal confidence ; and that the testatrix reposed full confidence in her brother, not only in his management of the estate, but in his selection of a successor ; that beyond this she extended no confidence, inasmuch as by distinct and precise words she limited the power of sale to her brother and his nominee. But the court held that as there was a trust of the proceeds, and the power was to effectuate this trust, its exercise was compulsory and not discretionary, and that it could well pass to the probate appointee.

The case of *Whitney v. Whitney* \* may be referred to, merely to show that an executor is the necessary trustee of testamentary trusts, and that a probate appointee succeeds thereto. There was there no power of sale to be exercised.

But in *Alley v. Lawrence*,† where a power of sale was given to executors, to whom the property had already been devised in trust to support the testatrix's children during their minority and that of the youngest of them, and then to divide it among them equally, it was held that the will gave the power of sale to them as executors, and that a deed executed by them simply as such was good. This case is therefore express to the point that such a power would survive ; for as attached to the office of executor, or, in more intelligible language, because coupled with the trusts to which the executor succeeded, it could be well executed by any one on whom those trusts might fall, even an administrator *de bonis non*. The case of *Warden v. Richards*‡ is even more strongly in point. The testator there appointed his brothers, by name, his executors, and authorized them "to take upon themselves the trust thereby created, &c., and, if necessary for the execution thereof, to sell any part or all

my real estate." One brother declined the executorship. The case presented all the points of objection to the survivorship of the power which were deemed fatal in *Tainter v. Clark*. The power was given to two *nominatim*, as the testator's brothers, and by their judgment of the necessity of the sale, a clear discretion was vested in both. But the court held that, as the object of the sale was to pay debts and legacies, it was a power coupled with a trust, and could well be exercised by one executor. In view, therefore, of what trusts have been uniformly held to be legacies by the same court, this decision goes the full length for which we contend.

Nor do the latter decisions present any conflict with this case. In *Carson v. Carson*,\* which might, in a hasty perusal, be thought to have an opposite tendency, the facts were, that executors, who were charged with payment of the income for life to the widow, and then the principal to her residuary legatee, and vested with a power of sale and investment, were sought to be held in trustee process for a debt due by the latter. The court, embarrassed by the language of the statute, by which all "debts, legacies, &c., due from or in the hands of the executor or administrator as such may be attached" by trustee process, while admitting that this trust attached to the executor, and unable to deny the long course of decisions uniformly holding such a gift a legacy, and the executor, as such, vested with its possession, nevertheless use language hardly warranted by the cases, saying, "This clearly contemplates a trust in the executors beyond the duty of paying the debts and distributing the assets in the ordinary way ;" and again, "They [the executors] do not hold the property merely in their capacity as executors. If they did, their trust would be discharged, and their duty performed, when they had collected the personal estate, paid the debts, legacies and charges," &c. They then proceed to point out the inconvenience, or rather impossibility, both of the executors performing their trust, if a remote distributee's creditor could compel them to account to him immediately, and the equal impossibility of keeping the judgment of such a creditor alive and operative until the estate accrued to the

\* 4 Gray, 226.

† 12 Gray, 378.

‡ 11 Gray, 277.

\* 6 Allan, 397.

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legatee in possession. It is really upon this ground that the case was decided, and the remarks of the court already quoted cannot be considered literally correct.

Indeed, the class of decisions in Massachusetts upon which we have been commenting are well founded upon English authorities, and on the principle there laid down that such a direction to distribute personalty, coupled with a power of sale of realty, makes an equitable conversion of such realty, out and out; giving the character of personalty thereto from the date of the will, and to the extent to which such distribution is to take place among the legatees; and that these become thereby *cestuis que trust*, with a right to insist on the exercise of the power.

Thus, in *Foone v. Blount*,\* by the terms of the will, the executors were to pay certain specified legacies, and to this end were "appointed, constituted and empowered" to sell certain real estate. It was objected that this was a devise of lands, not a legacy, and that therefore the devisees, who were papists, could not take; but the court declared this to be a power not coupled with a trust in real estate, but in personalty, and operative from the testator's decease to convert the land out and out. Similar decisions had been made in equity in *Yates v. Compton*,† and *Att'y-Gen. v. Gleg*,‡ and a power to sell to pay an annuity was held a conversion out and out from the testator's decease; and the same principle has been fully recognized in other courts in this country;§ and that as the land became personalty, *e converso*, the power to deal with it attached to whoever should become charged with the executorial duty; to a single surviving or accepting executor, or even an administrator *cum testamento annexo*.

In *Treadwell v. Cordis*,|| above referred to, the distinction is taken that, while under the Statute 21 Henry 8, c. 4, if one or more executors die, or do not accept the office, the survivor or remaining executors may well execute a power attached thereto, yet it is otherwise where they all accept

and one thereafter resigns or renounces, because the power has vested in him, and his renunciation cannot divest him thereof; and ancient decisions to this effect are referred to,\* and the same view has been adopted, in more than one modern case.† Indeed, in the case of *Conklin v. Egerton*, a very elaborate examination is made of the ancient law upon this point, and the testamentary duties of an executor are limited to dealing with personal property merely, while as to realty the executor acts not *qua* executor, but as trustee, whether he is a devisee of the land itself or only the donee of a power to sell it, because the will in this respect is a conveyance, not a testament. But, however well ascertained this distinction may have been at the early period of the common law, it is submitted that the course of decision in this state, already fully examined, by which the executor, as executor, stands charged with trust duties and powers properly attached thereto, has substantially overruled it. It would, indeed, be an anomaly for the same court to hold that the sureties on the executor's bond should be held responsible for the disposition of the proceeds of a power of sale conferred upon him even by the name of trustee, and yet that his approved resignation of the office of executor should not divest him of all title to deal with the land, when he had surrendered his power to act under the will from which alone it had proceeded. And as this distinction went on the ground that the resignation of his office by the executor did not relieve him of his character of grantee, it is hard to see how his refusal to accept that office from the Probate Court could have any other or greater effect. Indeed, under such a doctrine, nothing but a re-conveyance by him would be effectual to free him.

But if this distinction could be considered as having any foot-hold in this state, it has been definitely overruled by the late case of *Gould v. Mather*,‡ and the law placed on the ground for which we have been contending. The testator in this case, in the first clause of his will, appointed his wife and one Marshall respectively his executrix and executor; in

\* Cowp. 464.

† 2 P. W. 308, 310-311.

‡ 1 Ark. 356.

§ *Meekings v. Cromwell*, 1 Seld. 136; *Robert v. Herrell*, 4 Hill, 492; *Stagg v. Jackson*, 2 Barb. Ch. 86; *Boyd's Lease v. Taylor*, 2 Dall. 223.

|| 5 Gray, 841.

\* 15 Hen. 7, 11.

† *Conklin v. Egerton*, 21 Wend. 430, and cases there cited; *Tainter v. Clark*, 13 Metc. 220.

‡ 104 Mass. 283.

## TESTAMENTARY POWERS OF SALE.

the third clause charged "the said executrix and executor" with trusts during ten years to discharge such mortgages as they should deem expedient, to reserve such an amount as they might deem necessary for the support of the executrix, and during the same period, to reserve also such sums as in their judgment were necessary for the support of the testator's daughter and sons. In the fourth clause he directs that, "If it shall be deemed necessary or expedient to dispose of any of my real property for the benefit of the estate in the judgment of my executrix and executor, I hereby give them full power to do so, and invest the sums so received for the benefit" of the *cestuis que trust*.

Here, in the first place, the power was given *nominatim*. The word "said" does not, it is true, occur before executrix and executor; but to infer thence that this meant to refer to the office and not to the individuals already named, would be to assert that the testator meant there should be a succession of one male and one female in that office. It is clear the word "said" is omitted by inadvertence. In the second place, the power was given expressly in confidence and relying on the judgment of these two. In the third place, the duties which the power was to facilitate the execution of were trust duties, and only testamentary in the sense that they were contained in the will.

Both the executor and executrix qualified; the former subsequently resigned, and the latter alone executed the power of sale. It was objected that the power was a bare power, was discretionary, and could only be executed by both. But the court sustained the sale, and held that the trust underlying the power, and connected with duties charged on the executor by the will, attached to the office, were coupled with a trust, and would have survived to one executor on the decease of the other. "The power of sale in question," says Ames, J., "it is true, may not be, in the strict sense of the word indispensable to the final distribution of the estate; but it is manifestly subservient and auxiliary to the execution of the trusts which he has seen fit to connect with the administration of the will. It is certainly appropriate to and in entire harmony with the mode of administration which he has pointed out, and the

functions which he has thought proper to connect with the office of executor. It is part of the executorship," &c. The learned judge then remarks upon the distinction between resignation and non-acceptance. "The rule [of survivorship] seems to be the same also if one of the executors had refused to accept the trust. . . . It is difficult to see why a vacancy occasioned by the resignation of one of two, which is simply a refusal to be concerned with the trust thereafter, can stand on any different ground. The power seems not to be a mere naked authority, but is coupled with the trust of administration as one of its incidents, and its exercise is a matter of duty, and not of mere arbitrary discretion, whenever the necessity for its exercise shall arise."

A similar decision had been reached in the recent and almost parallel case of *Chandler v. Rider*,\* the only point of difference between the two being that the distinction last considered was not in issue in this case, as the power was exercised by a surviving, and not a continuing, executor. But the power was as discretionary, and the right to the proceeds seemed to be wholly dependent on the exercise of that discretion. Nevertheless, the court held that the power survived.

We consider, then, that it is well settled—in this Commonwealth at least—that all powers attached to testamentary trusts, which are not by express terms restricted to the donees, will attach to whoever occupies the position of executor, though he is but the single accepting, surviving, or continuing executor of several, even though expressly named; in a word, that the *nominatim* rule is entirely abrogated. And we think it follows, as a necessary consequence, that the same powers can be exercised by an administrator *cum testamento annexo*, and that the authority of *Tainter v. Clark* is seriously weakened, if not overruled. We are aware that in *Greenough v. Welles*† a different conclusion was reached; but we do not think that the doctrine, or rather *dictum*, put forward in that case can be maintained against later authorities already considered. The power in that case which was held to be personal, so as not to pass, was given to the executor to

\* 102 Mass. 268.

† 10 Cush. 571.



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enable him to invest the proceeds at interest for the benefit of the testator's daughters for life, the principal to be divided at their decease. This clearly differed in no respect from the power in *Gould v. Stratton*; on the contrary, its language is much more imperative, there being no expressed reference to the executor's discretion. It is also to be remarked that the point was quite unnecessary to the decision of the case, and that its discussion was waived by counsel. But, however this may be, the language of the subsequent decision, in *Blake v. Dexter*,\* seems to establish clearly the doctrine for which we contend. "In general, where the trusts are necessarily connected with the official duties of the executor, and are obviously subservient to the due execution of the will, the powers and trusts vested in the executor *qua* executor, are held by necessary implication to devolve on the administrator *de bonis non*, when not so expressed." The facts here were quite on all fours with those in *Greenough v. Welles*, and this decision must be regarded as plainly controlling the *dictum* in that case. There seems, therefore, to be no sound authority in this state to impeach the broad conclusion we have intimated to be the law, that such testamentary powers survive even to an administrator *cum testamento annexo*.—*American Law Review*.

## CANADA REPORTS.

### ONTARIO.

#### CHANCERY CHAMBERS.

##### STOVEL V. COLES.

###### *Staying proceedings pending a re-hearing.*

By analogy to the practice sanctioned by the Legislature with reference to staying proceedings pending Appeals to the Court of Error and Appeal, proceedings will be stayed pending re-hearings of decrees or orders of the Court of Chancery, upon security being given.

[April 29, 1873.—*Mr. Taylor*.]

At the hearing of this cause, effect having been given to an objection that all proper parties were not before the Court, the cause was struck out, and the plaintiff directed to pay to the defendants the costs which they had incurred by the cause having been brought to a hearing. There were a number of defendants and several of them had issued execution to enforce the payment of their costs.

This motion was made by the plaintiff to obtain a stay of proceedings under these executions and under the order made by the Chancellor at the hearing, until that order could be re-heard. It further appeared that the plaintiff's solicitor had written to the solicitors for several of defendants who had issued executions, promising that the costs should be paid, and upon the strength of this promise, executions had been stayed for some days.

The plaintiff offered to pay the amount of the costs into Court.

*MacLennan*, Q. C. for the application. The Legislature has by Con. Stat. U. C. c. 13 § 16 established the principle that parties intending to appeal may obtain a stay of proceedings pending the appeal, upon giving security as a matter of right; and the Court of Chancery has made the principle applicable to re-hearings: *Weir v. Matheson* (Vankoughnet, C.); *Deedes v. Graham* (Re-hearing term, 1872). It is not necessary to show that if the costs are paid there is danger of their not being recovered, the Legislature does not entertain that question.

*Evans*, C. *Moss*, *Arnoldi*, *Koefer* and *Spragge* for the several defendants.

By the English authorities, of which *Gibbs v. Daniel*, 9 Jur. N. S. 632; 4 Giff. 41 is the leading case, the rule is established that no stay of proceedings will be granted but where circumstances make it expedient the Court may require a party entitled to receive a sum of money, or costs, to give security for repayment, if the decree should be reversed. This rule has been followed in this country in *Churcher v. Stanley*, 26th Oct., 1871, *Freehold B. S. v. Choate*, 13th Nov. 1871, and *Carradice v. Currie*, 5th Feb., 1872, (decisions of Mr. Taylor, unreported), and other cases; and before the Court will order security to be given it must be shown that there is danger that the costs can not be recovered if they are paid. Any right which the plaintiff had to be relieved from payment of these costs has been waived by the promise given by his solicitor that they should be paid. *Walker v. Niles* 3 Chy. Ch. 418, was also cited.

**MR. TAYLOR, REFEREE IN CHAMBERS**—It is not suggested that if the costs taxed under the Chancellor's order, are paid over by the plaintiff there will be any danger of her not recovering them in the event of the order being reversed on re-hearing. On the one hand it is contended that this must be shown before an order will be made staying proceedings; on the other side it is said this is not necessary.

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Several cases were cited in which I have recently held, following the English authorities, that this should be proved. In none of these, however, was my attention called to the provisions of the Error and Appeal Act, as to staying proceedings pending an appeal, nor was the case of *Weir v. Matheson*, decided by the late Chancellor, cited to me. In that case he held that, following the principle sanctioned by the Legislature in the Error and Appeal Act, and by analogy to the practice in case of appeals, proceedings should be stayed pending re-hearing, on security being given. The same course was, I find, adopted by the present Chancellor, in *Winters v. Kingston Permanent Building Society*, 1 Chy. Ch. 217. These cases show that a different practice should prevail in this country from that which prevails in England and which I erroneously followed in *Carradice v. Currie* and some other cases. I do not think that the letters written by the plaintiff's solicitor asking the parties to stay execution for a few days, should make any difference.

The order therefore will be that upon the plaintiff paying into Court a sufficient sum to cover the costs provided for by the Chancellor's order further proceedings for enforcing payment, of these be stayed until the re-hearing. The costs of this application will be costs in the cause.

*Application granted.*

CAMPBELL V. EDWARDS.

*Staying proceedings pending re-hearing.*

On motions to stay proceedings pending a re-hearing the Court will follow the practice laid down in the Error and Appeal Act, with reference to staying proceedings pending an appeal to the Court of Error and Appeal.

[June 15, 1874.—Chancellor.]

A decree had been made directing the defendant to pay to the plaintiff a large sum of money and costs. The defendant had set the case down for re-hearing and had given notice of re-hearing.

*J. S. Ecart*, for defendant, now moved to stay proceedings pending the re-hearing, offering to give the same security as would be required on an appeal to the Court of Error and Appeal.

He cited *Weir v. Matheson*, (unreported), decided by the late Chancellor Vankoughnet. *Winters v. Hamilton Permanent Building and Savings Society*, 1 Chy. Ch. 217, and *Stovel v. Coles*, (*supra*.)

*W. G. P. Cassells*. The English cases show that the Court, looking upon a decree as bind-

ing until reversed, will direct the money to be paid over to the party declared by the decree to be entitled to it, upon his giving security for re-payment in case of a reversal of the decree. This is the practice most proper to be followed in this country, where a high rate of interest can be obtained; for a party might retain and use, pending the rehearing, the money which the decree ordered him to pay, and as he would only, if compelled to restore it upon the decree being affirmed, have to pay interest at six per cent, he might actually make a profit, by obtaining a higher rate of interest for the use of the money in the meantime; parties would thus be encouraged to re-hear and prolong litigation. The cases in England of *Gibbs v. Daniel*, 4 Giff. 41, 9 Jur., N. S., 632; *Merry v. Nichol*, L. R. 8 Chy., 9 Jur., N. S., 632, have been followed here in *Walker v. Niles*, 3 Chy. Ch. 418, and the unreported cases of *Churche v. Stanley*, (Mr. Taylor, 26th October, 1871); *Freehold Building Society v. Choate*, (Mr. Taylor, 13th November, 1871), and *Carradice v. Currie*, (Mr. Taylor, 5th February, 1872). In the case of appeals the Court has discretion, the letter of the Statute governing, but in the case of re-hearings it has a discretion which is unfettered by the statute.

MR. HOLMESTED, after taking time to consider, said that as the cases were conflicting and the practice therefore in an unsettled condition, he would direct the motion to be argued before a Judge.

The case was accordingly re-argued on the 15th June before the Chancellor.

SPRAGGE, C. I am of opinion that a change was made by the Error and Appeal Act (Con. Stat., U. C., c. 13), in the practice, with reference to staying proceedings under a decree while it remains questioned. The Legislature has thought fit to introduce the principle in such cases that the decree is to be looked upon as not final until the Court of Appeal has decided whether it was right or wrong, and I do not think that this principle is to be confined to cases of appeals to the Court of Error and Appeal, but is also applicable to re-hearings, the Act being a legislative declaration of what the rights of parties shall be under such circumstances. If this were not the case the practice as to re-hearings would be anomalous. The defendant in this case, for instance, would have to pay over the money, but if upon re-hearing the decree were reversed, and then the plaintiff appealed, the defendant could not obtain payment from the plaintiff pending the appeal, in consequence of the Statute. It is

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very true that the Court has in re-hearing cases a discretion, as it is not bound by the letter of the Statute, but still this is not a capricious but a judicial discretion, which the Court is bound to exercise in accordance with the principle established by the Error and Appeal Act.

An order was accordingly drawn up ordering that upon the defendant's giving security to the satisfaction of the Referee in Chambers for the due payment of the money and costs directed to be paid by the decree (in case the decree should be in part or in whole affirmed upon said re-hearing) proceedings under the decree be stayed pending the re-hearing. Further order that the costs of the application be costs in the cause.

## IRISH REPORTS.

FARRAR V. CARROLL.

*Practice—Administration—Misconduct of Executor—Costs—Writ of ne exeat regno.*

An executor, who had drawn out of bank a sum of money, forming portion of the assets of the testator, wrote to a legatee of the testator, claiming 6 per cent. on his portion and that of the other legatees, and informed him that he was about to emigrate from the kingdom. A bill to administer assets was thereupon filed, and a writ of *ne exeat regno* was issued against him. In his answer the executor admitted being in possession of the assets, and gave a full account thereof.

*Held*, that the costs of the proceedings up to and including the answer must be paid by the executor, but that he was entitled to the subsequent costs.

[*Irish Law Times*, July 10, 1874.]

Bill to administer the personal estate of Patrick Byrne. The testator died 9th March, 1873, leaving assets to the amount of £563 12s. 8d. By his will he disposed of the greater portion of that sum in legacies, including, among others, the sum of £300 to his nephew, Thomas Farrar, the present plaintiff. The debts of the testator were of a trifling amount. On May 9th, 1873, the defendant, (the testator's executor,) wrote to the plaintiff the following letter:—"Dear Sir: In regard to the will affair of your uncle, I have gone through it with great trouble and cost. I have down every shilling to satisfy all parties. I had to pay the witnesses a pound a day, and also for the copies of the will. People thought there was nothing to do with the money only to throw it here and there, the whole cost on me. Now, again, for a memory also; I have agreed for a grand headstone by his request, which amounts to a sum of £39. I also must

get 6 per cent. out of every one's portion. I intend to emigrate. In short, I would wish to settle it in honesty before I start. If all parties are not satisfied they must wait; I will pay them some time, if God spares me." The sum of £550, which had been lodged by the testator in the Bank of Ireland, was drawn out by the executor. An application was made to the Master of the Rolls in the matter of an administration summons for an order that a writ of *ne exeat regno* should issue against the defendant, but was refused on the ground that such an application should be made upon a bill of complaint. The present bill was then filed, the writ issued, and the defendant was arrested. In his answer, the defendant admitted the assets to the amount claimed.

*IV. O'Brien, Q. C.*, and, another, for plaintiff, cited *Springett v. Dushicood*, 2 Giff. 521; *Kemp v. Burn*, 4 Giff. 348; *Hide v. Heywood*, 2 Atk. 125.

*G. Foley* for the defendant.

SULLIVAN, M. R.—The only question I have to determine is as to costs. The will was proved on 8th April; the defendant, on 13th April drew the money out of the Bank of Ireland, and lodged it at a private bank in his own name, where he could get it in a moment's notice. I have no doubt he was planning a most flagrant fraud. It is impossible to conceive a more dishonest letter than he wrote to the plaintiff. He now admits that the statement as to his intending to emigrate was a falsehood. The plaintiff made an effort to secure the assets, and sought a writ of *ne exeat regno* on a summons, which application I then had to refuse. The writ of *ne exeat regno* had, I have no doubt, the effect of securing the money. No matter how bad the conduct of the defendant was before, I think his answer put him straight. He admitted he had the assets, and gave a full account of them, and was not asked afterwards to give any further account of the assets. The rule as to costs is that the executor is entitled to his costs of suit if his own conduct be fair and honest, more particularly where the assets have suffered no diminution. But the executor who is only made honest by the process of the law must pay for his folly or fraud. I am perfectly clear that, having regard to the letter of 9th May, the defendant must pay the costs up to and including his answer, but he is entitled to costs from that period down to and including this appearance.

## DIGEST OF ENGLISH LAW REPORTS.

## DIGEST.

## DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL,  
1874.*From the American Law Review.*

ACCOUNT.—See MORTGAGE, 1.

ACTION.—See COMPANY, 2, 3; EQUITY.

## ADEMPTION.

1. A testator, reciting that £1440, or thereabouts, was due from his son, secured by bills or notes, released his son from payment of interest to the time of the testator's death. At the date of the will the son owed the testator about £1400, which was paid off before the date of a codicil, which contained no reference to the son's debt or interest thereon. At the date of the codicil the son owed his father £1291 for advances made subsequently to the will. *Held*, that said son must pay interest on the £1291.—*Sidney v. Sidney*, L. R. 17 Eq. 65.

2. A testator, by his will, gave the residue of his property equally between his children on their attaining twenty-one. He subsequently covenanted that he would, during his life or within six months after his death, settle a certain sum upon his daughter. This sum was not so settled at the testator's death. *Held*, upon all the circumstances of the case, that said daughter's share of the residue was *pro tanto* adeemed.—*Stevenson v. Masson*, L. R. 17 Eq. 78.

3. A railway company served a notice upon W. to treat for the purchase of certain leaseholds. The price was settled by surveyors appointed by the company and W., and was agreed to by W. Before this W. had bequeathed the leaseholds to A. The sale of the leaseholds was not completed until after W.'s death. *Held*, that said bequest was adeemed; but that A. was entitled to rents accruing between the death of W. and the completion of said sale.—*Watts v. Watts*, L. R. 17 Eq. 217.

ADULTERY.—See DIVORCE, 1, 2.

ADVERSE POSSESSION.—See TRESPASS, 1.

AGENCY.—See INSURANCE, 2; SET-OFF.

ALLOTMENT.—See COMPANY, 3.

## ANNUITY.

A testator gave the residue of his estate, real and personal, to trustees for eleven years, upon trust to pay out of the rents and proceeds certain annuities. The testator then directed that the residue of said rents and proceeds should, during said term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate upon the expiration of said term; and after the determination of said term he de-

vised his real estate, subject to the payment of said annuities, with powers of distress and entry for the recovery of the said annuities as if they had been secured by lease for years, to said trustees to the use of T. in strict settlement. *Held*, that said annuities were not a charge upon the *corpus*, but must be paid out of the income.—*Taylor v. Taylor*. *In re Taylor's Estate Act*, L. R. 17 Eq. 324.

See COVENANT.

APPOINTMENT.—See DEVISE, 2.

ASSIGNMENT.—See BANKRUPTCY.

ATTORNEY.—See TRUST.

## AUCTION.

An auctioneer at a sale of horses sold a horse described in the catalogue as "steady to drive" and as to be sold subject to the conditions set forth therein. M. bought the horse at auction, and the auctioneer's clerk wrote in a sales ledger the name of M. and the price. Neither the catalogue nor conditions of sale were affixed to the sales ledger, nor were they referred to therein. *Held*, that there was not a sufficient memorandum in writing of a contract, within the Statute of Frauds, to bind M.—*Pierce v. Corf*, L. R. 9 Q. B. 210.

## BAILMENT.

The plaintiff delivered a carriage to the defendant, a livery-stable keeper, who put it into a building which had been erected for the defendant by a competent builder, and which, so far as the defendant knew, was well built. The building was blown over and the carriage injured. The plaintiff offered evidence to show that the builder had negligently and unskilfully built the building; but the evidence was rejected by the judge, who ruled that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to use ordinary care in keeping the carriage, and that, if he had used ordinary care in having the building erected by employing a builder, he would be exempt from liability for an event caused by the careless or improper conduct of the builder of which the defendant had no notice. *Held*, that said ruling was correct.—*Searle v. Laverick*, L. R. 9 Q. B. 122.

BANK.—See LIEN.

## BANKRUPTCY.

Two partners obtained an advance from A., and delivered to him a written agreement to assign to him on request their lease, stock, fixtures, and book-debts; provided that if the partners should repay said advance the agreement should be void; otherwise the premises were to be valued by valuers on each side, and any surplus repaid to the partners. Subsequently the partners became embarrassed, and thereupon, on request of A., assigned said lease, stock, &c., being all the partners' property, upon a valuation to A., who repaid to them a small surplus. Shortly afterwards the partners filed a petition in liquidation, stating their assets to be *nil*. *Held*, that said agreement was, after demand, a valid, equit-

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able security upon the property of the partners; and that the subsequent assignment was valid, and was not invalidated by the Bankruptcy or Bills of Sale Acts.—*Ex parte Izard. In re Cook*, L. R. 9 Ch. 271.

See COVENANT, 1.

BEQUEST.—See ADEMPMENT; ANNUITY; DEVISE; ILLEGITIMATE CHILDREN; LEGACY; SETTLEMENT.

## BILL OF LADING.

1. The master of a vessel may properly sign bills of lading in favor of the shipper of goods, without production of the mate's receipt for the goods, if he is satisfied that the goods are on board the vessel, and has no notice that any one but the shipper claims any interest in them.—*Hathesing v. Laing*, L. R. 17 Eq. 92.

2. The omission of the words "or order or assigns" from a bill of lading will not give an indorsee constructive notice of an agreement between the shipper and consignee to realize proceeds from the goods shipped, and appropriate the same to a special purpose. An indorsee of such a bill of lading, who also has the goods delivered to him, obtains legal and equitable title to the same. It seems that such a bill of lading is not a negotiable instrument.—*Henderson v. The Comptoir d'Es-compte de Paris*, L. R. 5 P. C. 153.

See HYPOTHECATION.

BILL OF SALES ACT.—See BANKRUPTCY.

## BILLS AND NOTES.

1. The acceptor of a bill requested the holder to defer presentment for payment, agreeing to hold himself liable in every respect on account of said accepted bill, as if it had been regularly presented at due date. The holder did not present the bill for payment at maturity. *Held*, that the maker was discharged.—*Latham v. Chartered Bank of India*, L. R. 17 Eq. 205.

2. B. accepted a bill drawn by A. Before the bill became due A. represented to a bank which held the bill that B. would be willing to accept a renewed bill, and a new bill was accordingly drawn by A. on B., and discounted by the bank. At the same time A. drew a check on the bank, which the bank accepted, payable to B., and sent it to B. in a letter stating that he had drawn a second bill on B., and enclosed the check to retire the first bill. B. before the first bill became due, received and cashed the check, but refused to accept the second bill. *Held*, that B. had no right to cash the check, unless he accepted the second bill; also, that B. was not discharged from liability as acceptor of the first bill by the transactions between A. and the bank.—*Torrance v. Bank of British North America*, L. R. 5 P. C. 246.

See MORTGAGE, 2.

BROKER.—See EVIDENCE.

BUOY.—See NEGLIGENCE, 2.

CARGO.—See CHARTER-PARTY; FREIGHT.

CHARGE.—See ANNUITY.

## CHARTER-PARTY.

By the terms of a charter-party a vessel was to load a full cargo and deliver the same at London, fire and other dangers of the sea excepted; "a lump sum freight of £5000 to be paid after entire discharge and right delivery of the cargo, in cash, two months after date of the ship's report inward at the custom house." A full cargo was loaded, but part was destroyed by fire on the voyage, and the remainder was delivered. *Held*, that the ship-owner was entitled to the whole of said £5000.—*Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. (Ex. Ch.) 99; s. c. L. R. 8 C. P. 469, n.

See CAPTURE.

CHECK.—See BILLS AND NOTES, 2.

CODICIL.—See ADEMPMENT, 1; WILL, 2.

## COLLISION.

For a case of collision, see *Beal v. Marchais*, L. R. 5 P. C. 316.

See NEGLIGENCE, 2.

COMMON RECOVERY.—See DEVISE, 1.

## COMPANY.

1. By the articles of a company, the qualification of a director was the holding of fifty shares. It was held that attending a meeting of the company as a director did not amount to a contract to take shares sufficient for qualification as director.—*Brown's Case*, L. R. 9 Ch. 102.

2. It seems that a director in a company who has signed the memorandum and articles of association, and has had shares appropriated to him, cannot set up, as a defence to an action against all the directors in consequence of false statements in a prospectus issued by them, that he took no part in preparing or issuing the prospectus.—*Peck v. Gurney*, L. R. 6 H. L. 377.

3. The appellant, not an original allottee, was the holder of shares in a company, and upon its being wound up, was placed upon the list of contributories, and paid a large sum upon the shares. He then filed a bill against the directors of the company, alleging misrepresentation and concealment of facts on the part of the directors in the prospectus they issued, and by which the appellant had been induced to purchase his shares, and he prayed indemnity from the directors. *Held*, that, as the prospectus was drawn up solely for the original allottees, the directors were not liable to the appellant.—*Peck v. Gurney*, L. R. 6 H. L. 377. See L. R. 2 H. L. 325; L. R. 18 Eq. 79.

CONDITION.—See LANDLORD AND TENANT, 1.

CONSTRUCTION.—See ADEMPMENT; ANNUITY; CONTRACT; COVENANT; CRIMINAL LAW; DEVISE; HYPOTHECATION; ILLEGITIMATE CHILDREN; LANDLORD AND TENANT, 1; LEGACY; MORTGAGE, 2; PACK-AGE; SETTLEMENT.

CONTINGENT REMAINDER.—See DEVISE, 1.

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## CONTRACT.

1. It was agreed that the plaintiff should serve the defendant "for twelve months certain, after which time either party should be at liberty to terminate the agreement, by giving the other three months' notice in writing." *Held* (by BRAMWELL and FROTT, B.B.; KELLEY, C. B., dissenting), that at the end of the twelve months either party could end the agreement without notice.—*Langton v. Carleton*, L. R. 9 Ex. 57.

2. The plaintiff agreed to sell to the defendant "the house and premises he now occupies, known by the sign of the 'White Hart,' with stabling and garden;" and it was agreed that if either party should refuse to perform the agreement, such party should pay the other "£100 as damages." At the time of the agreement one S. held, under lease, a coach-house and harness room attached to the "White Hart." The defendant refused to complete the agreement, as possession of the coach-house could not be given by the plaintiff. *Held*, that, as the coach-house was not in the plaintiff's occupation, it was not included in the agreement; but that said £100 was a penalty, and that the plaintiff could only recover damages awarded by a jury.—*Magee v. Lavell*, L. R. 9 C. P. 107.

3. Action for dismissal from service in breach of alleged contract. The plaintiff had written to the defendant as follows: "Referring to my conversation with you, I now state my willingness to enter the service of your firm for one year, on trial, on the terms; viz., a list of the merchants to be regularly called on by me to be made and corrected as occasion requires. My salary for the year to be £120. If the terms herein specified are in accordance with your ideas, confirm them by return, and I will then enter on my duties on Monday morning next." The defendant answered: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday. I have made a list of customers, which we can consider together." *Held*, that the letters did not constitute a complete contract.—*Appleby v. Johnson*, L. R. 9 C. P. 158.

4. A. and B. contracted as follows: "A. sells and B. buys all of the spars manufactured by M., say about 600 red-pine spars, averaging sixteen inches. The above spars will be out of the lot manufactured by J., the lengths of which according to his specification I am satisfied with." The J. lot contained 603 spars, of which 496 averaged sixteen inches. *Held*, that B. was bound to accept the 496 logs; the words, "say about" 600 spars, being words of expectation and estimate only, and not of warranty.—*McConnell v. Murphy*, L. R. 5 P. C. 203.

See BILLS AND NOTES, 2; COMPANY, 1; CORPORATION; LEASE; LIMITATIONS, STATUTES OF; MORTGAGE, 2; SPECIFIC PERFORMANCE.

## CONTRIBUTORY NEGLIGENCE. — See NEGLIGENCE.

## CORPORATION.

The contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians, be under seal.—*Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91.

## COSTS, BILL OF.—See PRIVILEGED COMMUNICATIONS.

## COVENANT.

1. A covenant by a solvent trader to settle all future real and personal estate which he should at any time, during his intended coverture, be entitled to upon the trusts set forth in the settlement of the property be then owned, *held*, void as against creditors, who were entitled to shares acquired by said trader subsequent to said settlement, and which were standing in his name at the time of his bankruptcy.—*Ex parte Bolland. In re Clint*, L. R. 17 Eq. 115.

2. A husband covenanted in a deed of separation to pay an annuity to his wife during their joint lives, and so long as they should live separate and apart. Subsequently the husband obtained a divorce for the adultery of his wife. *Held*, that he was not released from his covenant to pay said annuity.—*Charlesworth v. Holt*, L. R. 9 Ex. 88.

3. A. sold a portion of his land to B. by deed, which declared that it was agreed that an adjoining piece of land belonging to A. should never be sold, but left for the common benefit of both parties and their successors. *Held*, that said clause amounted to an agreement that the piece of land should be left open in the state it was at the date of the deed; and that B.'s vendee might apply to a court of equity to obtain the removal of a building erected upon said land.—*McLean v. McKay*, 5 P. C. 327.

See LANDLORD AND TENANT, 2; LEGACY; SETTLEMENT, 1.

## CRIMINAL LAW.

Certain Chinese coolies, headed by K. while in a French vessel on the high seas killed the master of the vessel and seized the vessel and run her ashore on the Chinese coast and escaped. Under an ordinance authorizing magistrates at Hong-Kong to arrest Chinese who, there is probable cause to believe, have committed "any crime or offence against the laws of China," K. was there arrested on a charge of murder. K. was released on *habeas corpus*, and again arrested on a charge of piracy. *Held*, that said ordinance covered crimes and offences against the laws of all nations, and not those peculiar to the laws of China; that K., in killing said master, was not guilty of murder within said ordinance; that piracy was not an offence against the law of China within said ordinance; and that if K. was punishable for piracy, it was only because that was a crime which *jure gentium* is justiciable everywhere. Also, that K. could not be released on *habeas*

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*corpus* from the second arrest, on the ground that he was committed a second time for the same offence, contrary to 31 Car. 2, c 2, § 6. This section only applies when the second arrest is substantially for the same cause as the first, so that the return to the second writ of *habeas corpus* raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first.—*Attorney General for the Colony of Hong-Kong v. Kwok-a-Sing*, L. R. 5 P. C. 179.

**CRUELTY.**—*See* DIVORCE, 1, 2.

**DAMAGES.**—*See* CONTRACT, 2; LEGACY.

**DEMAND.**—*See* LANDLORD AND TENANT, 1.

**DEMURRAGE.**—*See* FREIGHT.

**DEMURRER.**—*See* PLEADING.

**DEVISE.**

1. A testator devised a freehold estate to trustees and their heirs in trust to stand seized of the same during the life of A., and also, until the whole of the testator's debts were paid, upon trust to set and let the same, and apply the rents and the value of whatever timber may be considered at its best growth, in discharge of said debts; and after said debts were paid, upon further trusts to pay over the rents to A. during his life; and after A.'s death the testator gave said estate to the heirs of the body of A. After said debts were paid, said trustees conveyed said estate to A. for life; who subsequently suffered a common recovery, and then mortgaged the estate. After A.'s death his eldest son filed a bill against the mortgagee, alleging that under said devise A. was only equitable tenant for life; that the limitation to the heirs of the body of A. was a legal contingent remainder; that such remainder was intended to be supported by the legal estate in said trustees; that their conveyance to A. was a breach of trust, of which said mortgagee had notice; and praying that said mortgagee might be declared a trustee of the property for the plaintiff. *Held*, that said trustees took a legal fee by the terms of the devise, and that consequently A. took an equitable estate tail, which was barred by the recovery.—*Collier v. Walters*, L. R. 17 Eq. 252. *See* 34 Beav. 426; L. R. 1 Ch. 81.

2. A testator gave all his property to his wife for her sole use and benefit, "in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." *Held*, that the wife took an estate for life, with power of disposition among her children in her lifetime, or by deed or will, as she might think fit.—*Curnick v. Tucker*, L. R. 17 Eq. 320.

3. For a case where it was held that, from the tenor of a will, there was evidence of intention in the testator not to include leaseholds for years in a devise of lands, see *Prescott v. Barker*, L. R. 9 Ch. 175.

*See* ADEMPMENT; ANNUITY; ILLEGITIMATE CHILDREN; LEGACY; SETTLEMENT, 2.

**DIRECTOR.**—*See* COMPANY, 2.

**DISCOVERY.**—*See* INTERROGATORY, 1.

**DISSEISIN.**—*See* TRESPASS, 1.

**DOMICILE.**

Change of domicile.—*See Stevenson v. Mason*, L. R. 17 Eq. 78.

**EASEMENT.**

The plaintiff was grantee of a right of way for a tow-path over land of M. M. built a road and bridge across the canal, obstructing the tow-path; and the plaintiff in consequence went around the bridge, and then back to the tow-path. M. subsequently sold the land adjoining the road and bridge to the defendants. The plaintiff used the substituted path around the bridge for many years, when the defendants erected a fence along the side of said street, preventing the plaintiff crossing the road. *Held*, that it was not necessary for the plaintiff to proceed against M. for the removal of the bridge; and that the defendants would be restrained from interfering with the plaintiff's substituted right of way around the bridge.—*Selby v. Nettlefold*, L. R. 9 Ch. 111.

*See* TRESPASS, 2.

**ELECTION.**—*See* PRIVILEGED COMMUNICATIONS, 2.

**ENTRY.**—*See* LANDLORD AND TENANT, 1.

**EQUITY.**

S., who had effected two policies of insurance with an insurance company, brought actions upon the policies. An order of court was made that one action should be stayed until the other had been tried, the company agreeing to be bound by the result of that action if against them. S., however, was left at liberty to proceed with the other action, if judgment should be against him. The company filed a bill in equity to have both the policies cancelled, as having been obtained by fraud. Judgment in said action at law was subsequently given for the company, on the ground that the policies were obtained by fraud. The court ordered the policies to be cancelled.—*London and Provincial Ins. Co. v. Seymour*, L. R. 17 Eq. 85.

*See* COVENANT, 3; SPECIFIC PERFORMANCE, 1.

**ESTATE FOR LIFE.**—*See* DEVISE, 2.

**EVIDENCE.**

The plaintiff was to receive a commission if the defendant's house was leased by him. A. went to the plaintiff's office, and inquired what houses he had to let, and was given cards to view several houses, among which was the defendant's. The premium for the house as given to A. by the plaintiff was £2200. A few days later A. examined the house with the defendant, and the offer was accepted. The judge asked A., under objection by the defendant, whether he should have taken said house if he had not gone to the plaintiff's and obtained a card to the same, and A. replied that he thought not. *Held*, that there was evidence for the jury that A.

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had taken said house through the plaintiff's intervention. It seems that said question was admissible.—*Mansell v. Clements*, L. R. 9 C. P. 139.

See INTERROGATORY, 2; POOR-RATE; WILL, 1.

## FREIGHT.

The defendant shipped upon the plaintiff's vessel petroleum, to be delivered at Havre, and to be taken out within twenty-four hours after arrival, or pay £10 per day demurrage. The authorities at Havre refused to permit the petroleum to be landed; and it was taken, by direction of the ship's broker, to Honfleur and Trouville, but permission to land was there also refused. The vessel then returned to Havre, and transhipped the petroleum into lighters hired by G., but, being obliged by the authorities to reshipe it, sailed back to London. *Held*, that the plaintiff was entitled to freight, back freight, and expenses, but not to demurrage and expenses incurred in ineffectual attempts to land the petroleum at Honfleur and Trouville.—*Cargo ex Argos*, L. R. 5 P. C. 134; s. c. L. R. 4 Ad. & Ec. 13; 8 Am. Law Rev. 99.

HUSBAND AND WIFE.—See COVENANT, 2.

HABEAS CORPUS.—See CRIMINAL LAW.

## HYPOTHECATION.

A., in Bombay, shipped cotton to B., in Liverpool, and drew a bill against the cotton for B.'s acceptance. A. insured the cotton, and then sold the draft to a bank, to which he gave the bill of lading with a letter of hypothecation, and the policy of insurance. The letter of hypothecation authorized the bank, in default of acceptance or payment of said bill, or on B.'s suspension during the currency of the bill, to sell the cotton, and apply the proceeds in payment of the bill; "the balance, if any to be placed against any other of A.'s bills which may at the time be in the hands of the said bank, or any liability of A. to the bank." B. accepted the bill, but, before its maturity, failed, and the bill was dishonored. The cotton was burnt at sea and became a total loss. The bank received the insurance money, which was more than the amount of the bill, and claimed the surplus toward satisfying other bills of A. held by the bank and unpaid. A. had assigned said insurance money to a creditor before it was paid to the bank. *Held*, that the bank was only entitled to said insurance money to the amount of said bill.—*Latham v. Chartered Bank of India*, L. R. 17 Eq. 205.

IDIOT.—See—RAPE.

## ILLEGITIMATE CHILDREN.

A testator, who had gone through the ceremony of marriage with M., his deceased wife's sister, bequeathed half of his property to the two then living children of M., and all other the children he might have or be reputed to have by M. At the date of the will M. was *en-ciente* with a third child, whom the testator

sequently acknowledged as his child. *Held*, (SELBORNE, L. C., dissenting), that said third child was entitled to share with the other two children.—*Occleston v. Fullalove*, L. R. 9 Ch. 147.

## INJUNCTION.

1. Injunction refused to restrain an "Underwriter's Registry" association placing upon their registry, after the name of a vessel belonging to a member of the association which had ranked in the highest class, the words, "class suspended."—See *Clover v. Royden*, L. R. 17 Eq. 190.

2. An injunction was granted to restrain the defendant from allowing water pipes which he had laid, to remain in land belonging to the plaintiff but over which there was a highway.—*Goodson v. Richardson*, L. R. 9 Ch. 221.

See EASEMENT; EQUITY; SPECIFIC PERFORMANCE, 1; TRESPASS, 1.

INNKEEPER.—See BAILMENT.

## INSURANCE.

1. A policy of insurance upon the life of G. was assigned to trustees, to hold the proceeds for the benefit of C. for life, remainder upon such trusts as C. should appoint. The trustees had power to pay the premiums. C. subsequently, by deed to which G. was party appointed the policy and moneys to become due thereon to the plaintiffs to secure certain advances. The plaintiffs in consequence of said trustees and C. neglecting to pay the premiums, paid them themselves, and kept the policy alive. On the death of G. the trustees refused to pay any of the policy money to the plaintiffs. *Held*, that the plaintiffs were entitled to be repaid the amount they had paid in premiums with interest.—*Gill v. Downing*, L. R. 17 Eq. 316.

2. A. obtained a certificate of insurance on flour in his own name. The certificate stated that the insurance was to be subject to all the provisions contained in the policies of the insurance company. It was the custom of the company to issue to the holder of the certificate a policy running thus: "I, A. as well in my own name as for and in the name of every other person to whom the same doth, may, or shall appertain," do make insurance, &c.; and it was a condition of the policy that an action should be brought within one year after the loss. The above flour belonged to B., and was shipped by A., consigned to B. on board a vessel which was last seen afloat on the 22d of November, 1867, in the Gulf of St. Lawrence, where a few days later a violent storm raged. The vessel was found, bottom up, ashore, in May, 1868, when part of the flour was recovered and necessarily sold at an intermediate port, realizing about a quarter of the insured value. An action on the policy was brought by B. in March, 1869. *Held*, that B. was entitled to bring the action in his own name; and that the loss did not become total until it was sold at an intermediate port in consequence of the impossibility of carrying it to its destination,



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and that therefore the action was brought in season.—*Browning v. Provincial Insurance Company of Canada*, L. R. 5 P. C. 263.

See EQUIT; HYPOTHECATION.

INTEREST.—*See* ADEMPION, 1.

INTERROGATORIES.

1. In an action by the rector of a parish against the patron of the living, for one-half of the rent of the churchyard and of the tithe rent-charge alleged to have been wrongfully received by the patron, the plaintiff was permitted to administer interrogatories as to the period for which the patron and his predecessors had received the rent and rent-charge, and as to the circumstances under which they had so received them.—*Towne v. Cocks*, L. R. 9 Ex. 45.

2. In an action for seduction of the plaintiff's daughter, interrogatories as to the defendant's pecuniary means cannot be administered to the defendant; but interrogatories as to whether the defendant had had sexual intercourse with the daughter, and had stated that he believed that she had not had such intercourse with any other man, are allowable.—*Hodgson v. Taylor*, L. R. 9 Q. B. 79.

JUS GENTIUM.—*See* CRIMINAL LAW.

LANDLORD AND TENANT.

1. A part of a house was leased upon condition that, if the lessee should make default in payment of rent "within twenty-one days after the same shall become due, being demanded," it should be lawful for the lessor without further proceedings to re-enter. *Held*, that, to entitle the lessor to re-enter, he must demand rent after the expiration of said twenty-one days. The formalities of a common law demand need not be observed.—*Phillips v. Bridge*, L. R. 9 C. P. 48.

2. B. demised to the plaintiffs, by an instrument not under seal, "standings" for three lace-making machines. B. had previously mortgaged the building. The mortgagees, subsequently sold the premises to the defendant; but before the sale the plaintiffs attempted to renew their lease with the defendant, but failed so to do. *Held*, that the defendant was not bound by the demise from B. to the plaintiffs, as it was not by an instrument under seal, as required by Statute 32 Hen. 8, c. 34.—*Smith v. Eggington*, L. R. 9 C. P. 145.

LEASE.

The plaintiff agreed to let, and the defendant to take, a dwelling-house for a term of seven years; upon terms (among others) that the defendant should, during the last year of the term, paint the house. The defendant occupied the house seven years, but neglected to paint the house at the end of the term. *Held*, that though said agreement was void as lease, yet that the defendant, by occupying for the whole seven years, bound himself to the performance of his agreement to paint.—*Martin v. Smith*, L. R. 9 Ex. 50.

See EVIDENCE; LANDLORD AND TENANT, 1; LEGACY; MINES; SPECIFIC PERFORMANCE, 2.

LEGACY.

A testator bequeathed to the plaintiff "all and every sums of money which may be due to me at the time of my decease." *Held*, that damages recovered by the testator's executrix, for breach of covenant in a lease which took place in the testator's lifetime, passed under the bequest.—*Bide v. Harrison*, L. R. 17 Eq. 76.

See ADEMPION; ANNUITY; DEVISE; ILLEGITIMATE CHILDREN; SETTLEMENT, 2.

LETTER.—*See* CONTRACT, 3.

LIBEL.—*See* PRIVILEGED COMMUNICATIONS, 2; SLANDER.

LIEN.

The defendants, bankers, who were in the habit of making advances to L. on the security of deeds and documents deposited with them, were held to have no general lien upon a box deposited with them by L., of which L. alone held the keys, and to which he only had access.—*Leese v. Martin*, L. R. 17 Eq. 224.

See TROVER.

LIFE-ESTATE.—*See* DEVISE, 2.

LIMITATIONS, STATUTE OF.

A testator died in 1857, and his widow took possession of all the real and personal property, and paid interest upon a debt due from the testator to the plaintiff until February, 1864. In September, 1870, the will was proved, and under it the wife took an estate for life in the testator's property. *Held*, that the plaintiff's debt was barred by the Statute of Limitations.—*Boatwright v. Boatwright*, L. R. 17 Eq. 71.

LIQUIDATED DAMAGES.—*See* CONTRACT, 2.

LOSS.—*See* INSURANCE, 2.

MARKET VALUE.—*See* POOR-RATE.

MASTER.—*See* BILL OF LADING, 1.

MATE.—*See* BILL OF LADING, 1.

MINES.

The Queen possesses the mines in the Isle of Man as of her own original title in the soil. It was held that the holder of a mining lease from the Queen was not liable to make compensation for the withdrawal, by percolation into his mine, of water which would have otherwise flowed into, or would have been retained in, superjacent land.—*Ballacorkish Silver, Lead, and Copper Mining Co. v. Harrison*, L. R. 5 P. C. 49.

See TRESPASS, 2.

MORTGAGE.

1. A mortgagee in possession, defendant to a bill for redemption, admitting the mortgage to be redeemable, cannot refuse to state the particulars of his accounts as mortgagee.—*Elmer v. Creasy*, L. R. 9 Ch. 69.

2. A mortgagor a station and the stock upon it to B., to secure repayment of a certain sum with interest at a certain date, and to secure payment of any bill which the mortgagee might take, make, or endorse, by way of

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renewal of the note secured by the mortgage. The bill was renewed from time to time by a bank which had discounted it; and the mortgagee paid the discounts on behalf of the mortgagor, and entered the discounts in the same account with other transactions with the mortgagor, debiting him with interest and commissions on the same. *Held*, that the sums advanced in payment of the discount on the renewed bills were covered by said mortgage, and were not an advance to said mortgagor on his personal security only.—*Fenton v. Blackwood*, L. R. 5 P. C. 167.

See LANDLORD AND TENANT, 2; PRIORITY.

MURDER.—See CRIMINAL LAW.

## NEGLECTANCE.

1. A tug, towing a vessel in a thick fog, ran the vessel aground. The vessel had not requested the tug not to proceed. *Held*, that the vessel was guilty of contributory negligence, and that the tug was not liable for damages.—*Smith v. St. Lawrence Tow-boat Co.*, L. R. 5 P. C. 308.

2. The master of a vessel moored to a buoy which belonged to a private company. The mooring of ships to the buoy was sanctioned by the port authorities. The master also got an anchor in readiness for use in case of necessity. The shackle band of the buoy gave way in a gale, and the vessel drifted. The master endeavored to drop anchor, but its chain became accidentally entangled, and the anchor did not reach bottom until the vessel had collided with another vessel. *Held*, that under the circumstance the master was guilty of no negligence in mooring to the buoy.—*Doward v. Lindsay. The William Lindsay*, L. R. 5 P. C. 338.

3. The plaintiff, a season-ticket holder, and residing near a station, arrived at the station when it was dark; and hearing the opening and shutting of carriage doors, and seeing another person alight, stepped from his carriage which had overshot the platform, and fell and was injured. The train had made its final stoppage at the station when the plaintiff got out, and was not afterward backed into the station. *Held*, (the court having liberty to draw inferences of fact), that there was evidence of negligence on the part of the railway company, and no evidence of contributory negligence on the part of the plaintiff.—*Weller v. London, Brighton, & South Coast Railway Co.*, L. R. 9 C. P. 126.

4. The plaintiff was a passenger on the defendant's railway, travelling to B. On arrival at B. the name of the station was called out, and the train stopped, leaving the carriage in which was the plaintiff beyond the platform. The plaintiff attempted to alight; but the train, immediately after stopping as aforesaid, was backed to a proper position in the station, and the plaintiff was thrown down and injured. The plaintiff was familiar with the station. *Held*, that calling out the name of the station did not amount to an invitation to alight, and that there was no evidence of negli-

gence on the part of the defendant to go to the jury.—*Lewis v. London, Chatham, & Dover Railway Co.*, L. R. 9 Q. B. 66.

See TRESPASS, 2.

NOTICE.—See BILL OF LADING, 2; CONTRACT, 1; PRIORITY.

## PACKAGE.

Pictures were placed in a waggon open at the top. *Held*, that the pictures were contained in a package within 11 Geo. 4 and 1 Wm. 4, c. 68.—*Whaite v. Lancashire & Yorkshire Railway Co.*, L. R. 9 Ex. 67.

PARTNERSHIP.—See BANKRUPTCY; PRIORITY.

PARLIAMENTARY ELECTION.—See PRIVILEGED COMMUNICATIONS, 2.

PERIL OF THE SEAS.—See CHARTER-PARTY.

PIRACY.—See CRIMINAL LAW.

## PLEADING.

Declaration that the defendants maliciously and without reasonable cause caused the plaintiff's ship to be arrested for necessities supplied by H., and to be detained until proceedings in the court were determined and the ship released. Demurrer. *Held*, (by BLACKBURN and ARCHIBALD, JJ.; QUAIN, J., dissenting), that by reasonable intendment the declaration must be taken to mean that the proceedings were determined in the plaintiff's favour, and that the declaration was good.—*Redway v. McAndrew*, L. R. 9 Q. B. 74.

See SET-OFF.

## POOR-RATE.

A railway company acquired a branch line upon terms which made the owners of the branch line become shareholders in said company. In consequence of competition the income from the branch line became very small. It was *held*, that, in assessing the poor-rate upon the branch line, the fact that three other railway companies with which the branch line connected would pay a high rent for the branch line if it were in the market, was to be taken into account in ascertaining the rent for which the branch line would reasonably rent.—*Queen v. London & North Western Railway Co.*, L. R. 9 Q. B. 134.

PRACTICE.—See INTERROGATORY, 2; WILL, 2.

PRINCIPAL AND AGENT.—See INSURANCE, 2; SET-OFF.

## PRIORITY.

The tenants in common of certain land entered into partnership under the terms of which the land was to be partnership property; and the business was conducted on the land. One of the partners mortgaged his moiety of the land to secure a private debt. The mortgagee knew that the partnership was in occupation of said land. Said partner absconded, and the remaining partner was obliged to pay the firm debts, whereby a considerable sum became due him on the partnership accounts. *Held*, that said mortgagee had constructive notice of the title of the

## DIGEST OF ENGLISH LAW REPORTS.

partnership in said land, and that his claim must be postponed to that of the partner.—*Cavander v. Bullecl*, L. R. 9 Ch. 79.

## PRIVILEGED COMMUNICATIONS.

1. Confidential communications between a solicitor and client before and with no view to litigation are privileged. Bill of costs held to be privileged.—*Turton v. Barber*, L. R. 17 Eq. 329.

2. A and B. were candidates for Parliament. The chairman of a district committee formed to promote B.'s election, and D.'s election agent, wrote to A.'s election agent, stating that A. had been guilty of bribery. Held, that the communication was not privileged.—*Dickeson v. Hilliard*, L. R. 9 Ex. 79.

PROBATE.—See WILL, 2.

PROSPECTUS.—See COMPANY, 2.

PROVISO.—See SETTLEMENT, 2.

RAILWAY.—See NEGLIGENCE, 3, 4.

## RAPE.

An attempt to have connection with a girl who was to the prisoner's knowledge so idiotic as to be incapable of expressing assent or dissent, held, to be an attempt at rape.—*The Queen v. Barratt*, L. R. 2 C. C. 81.

RECEIPT.—See BILL OF LADING, 1.

RECOVERY.—See DEVISE, 1.

RE-ENTRY.—See LANDLORD AND TENANT, 1.

RENT.—See LANDLORD AND TENANT, 1.

RENT-CHARGE.—See INTERROGATORY, 1.

RESIDUARY GIFT.—See ADEMPION, 2.

RIGHT OF WAY.—See WAY.

SALE.—See AUCTION; EVIDENCE; TROVER.

SEAL.—See CORPORATION.

SECURITY.—See BANKRUPTCY; MORTGAGE, 2.

SEDUCTION.—See INTERROGATORY, 2.

## SET-OFF.

Action for goods sold and delivered. Plea, that the goods were sold to the defendant by S., then being agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owners thereof, and that S. sold the goods in his own name and as his own goods with consent of plaintiffs; that the defendants did not know that S. was the plaintiffs' agent; and that before they did know that the plaintiffs owned said goods or that S. was their agent, S. became indebted to the defendants in an amount equal to the plaintiffs' claim. Replication that the defendants had the means of knowing that S. was only agent of the plaintiffs. Held, that the plea was good, and the replication no answer to it.—*Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

## SETTLEMENT.

1. In a marriage settlement, a covenant to settle property acquired after the marriage is to be construed as applying only to property

acquired during the coverture, although the usual words "during the intended coverture," were omitted from the settlement.—*In re Edwards. In re London, Brighton & South Coast Railways Act*, L. R. 9 Ch. 97.

2. A testator devised his P. estates in trust for C., the second son of A., provided that if C. should become entitled in possession to the S. estates, then said trusts in favour of C. were to cease. The S. estates had been settled upon A. in tail male. A., with his eldest son B., executed a disentailing deed of the S. estates, limiting a portion thereof to A. in fee, and the remainder to such uses as A. and B. should appoint. A. and B. accordingly appointed to A. for life, with power of creating a certain charge, remainder as B. and C. should appoint. A. created said charge. B. and C. appointed, subject to a life-estate in B., to the use of C.'s daughter for life, with remainders over until the entail in the P. estate should be barred; then to the use of C. for life, remainder to C.'s first and other sons in tail male. B. died, and subsequently A. died. Held, that as C. acquired the S. estates under a new title, and as said estates were destroyed in identity in point of quantity and value, said proviso did not take effect, and C. did not lose the P. estates.—*Meyrick v. Laws. Meyrick v. Mathias*, L. R. 9 Ch. 237.

See ANNUITY; COVENANT, 1.

SHAREHOLDER.—See COMPANY, 1, 3.

## SLANDER.

Declaration that the defendant falsely said of the plaintiff, a stone-mason, "He was the ringleader of the nine-hours system," and "He has ruined the town by bringing about the nine-hours system, and he has stopped several good jobs from being carried out by being the ringleader of the system at L.," whereby the plaintiff was discharged from his position as mason in certain works. Held, that said words were not defamatory in themselves; and were not connected with the trade of the plaintiff, either by averment or by implication; and were therefore not actionable, even though followed by damage.—*Miller v. David*, L. R. 9 C. P. 118.

See PRIVILEGED COMMUNICATIONS, 2.

SOLICITOR.—See TRUST.

## SPECIFIC PERFORMANCE.

1. The defendant contracted to deliver to the plaintiff the whole of the get of coal raised from a colliery leased by the defendant, and not to be less in quantity than a specified amount. Subsequently the defendant contracted to sell the colliery to R. Held, that the court had no jurisdiction to grant an injunction restraining the defendant from selling the colliery. It seems that a court of equity will not restrain the breach of a contract which it cannot specifically perform.—*Fothergill v. Rowland*, L. R. 17 Eq. 132.

2. A. agreed in writing to lease a wine-cellar from B. for twenty years from a certain future date. As inducement to the agreement, B. had promised to make the cellar

## DIGEST OF ENGLISH LAW REPORTS.

dry. A. entered into possession, and remained there two years, but, finding that the cellar had not been made dry, complained of the dampness to B., and paid his rent under protest. B. brought a bill for specific performance of said agreement by the execution of lease in accordance therewith. *Held*, that A. had not precluded himself from setting up in answer to the bill non-performance of the agreement to keep dry. Bill dismissed.—*Lamare v. Dixon*, L. R. 6 H. L. 414.

STABLE-KEEPER.—See BAILMENT.

STATUTE.—See BANKRUPTCY; CRIMINAL LAW; LANDLORD AND TENANT, 2; PACKAGE.

STATUTE OF FRAUDS.—See AUCTION.

STATUTE OF LIMITATIONS.—See LIMITATIONS, STATUTE OF.

TAXES.—See POOR-RATE.

TENANT IN COMMON.—See PRIORITY.

TITHES.—See INTERROGATORY, 1.

TOTAL LOSS.—See INSURANCE, 2.

TRESPASS.

1. H. brought ejectment against S., who set up adverse possession for twenty years, and H. was nonsuited. He then went to the land in question and cut down a tree, and threatened to cut down more. *Held*, that cutting down the tree was not evidence of possession, but only a trespass, and H. was enjoined from cutting down any more trees. *Stanford v. Hurlstone*, L. R. 9 Ch. 116.

2. In the defendant's land were hollows caused by the subsidence of the ground over spots which had been worked out in mining operations. Heavy rains caused water to overflow from a watercourse running over the land into the hollows, thence into the defendant's mines, and thence into the plaintiff's mines. The defendant diverted the watercourse, and thereby lessened its liability to overflow. The defendant had not been guilty of negligence in working his mines; and he offered evidence to show that he had taken all reasonable precautions to guard against emergencies. The judge excluded the evidence, and directed a verdict for the plaintiff. *Held*, that said evidence should have been admitted; and that the opinion of the jury should be taken as to whether what was done by the defendant was done in the ordinary, reasonable, and proper mode of working the mine. New trial ordered.—*Smith v. Fletcher*, L. R. 9 Ex. (Ex. Ch.) 64; s. c. L. R. 7 Ex. 305; 7 Am. Law Rev. 300.

See INJUNCTION, 2.

TROVER.

The purchaser of goods which remain in the vendor's possession, and subject to his lien for the purchase-money, cannot maintain trover against a third party for their conversion.—*Lord v. Price*, L. R. 9 Ex. 54.

TRUST.

A., a trustee, appointed B. a trustee of half of the trust-fund against the terms of

the trust. A.'s solicitor advised against said appointment, but drew a deed of transfer from A. and a deed of indemnity from B.; and he also introduced A. to a broker, for the purpose of enabling him to sell a portion of the trust-fund for payment of costs. B.'s solicitor examined and approved the deed appointing B. trustee, but warned B.'s wife, who was a *cestui que trust*, of the consequences which might follow a change in the trust. B. subsequently misapplied the trust-fund held by him. *Held*, that the solicitors of A. and B. were not liable for the misapplication of said trust-fund by B.—*Barnes v. Addy*, L. R. 9 Ch. 244.

See DEVISE, 2.

TUG.—See NEGLIGENCE, 1.

VALUE.—See POOR-RATE.

VENDOR AND PURCHASER.—See COVENANT, 3.

WATER.—See MINES.

WAY.

A railway company took land for the railway under statutory powers, and, in accordance with their contract with the owner of the land, built level crossings connecting the portions of the land separated by the railway. Said land was, at the time of the contract, subject to a statutory provision against being built upon. This prohibition was subsequently removed, and the land was built upon. The company objected to the occupants of the houses crossing their line at said crossings. *Held*, that the right to use said crossing was not restricted to purposes for which the land adjoining the railway was used at the time of said contract, and that said occupants might use said crossings, but so as not to obstruct the proper working of the railway.—*United Land Co. v. Great Eastern Railway Co.*, L. R. 17 Eq. 158.

WILL.

1. Declarations of a testator that he had destroyed his will were admitted, not as evidence of such destruction, but as evidence of intention, from which, when united with other circumstances, destruction may be inferred.—*Keen v. Keen*, L. R. 8 P. & D. 105.

2. The court allowed, with consent of all parties, proof of a will, reserving power to the executor to prove certain codicils not in the country, upon his filing an undertaking to prove such codicils as soon as they, or an exemplification thereof, should come to his hands.—*In re Goods of Roberts*, L. R. 8 P. & D. 110.

See ADEPTION; ANNUITY; DEVISE; ILLEGITIMATE CHILDREN; LEGACY; LIMITATIONS, STATUTE OF; SETTLEMENT, 2.

WITNESS.—See INTERROGATORIES, 2.

WORDS.

"Crime or Offence."—See CRIMINAL LAW.

"Lands."—See DEVISE, 3.

"Or Order or Assign."—See BILL OF LADING, 2.

"Say about."—See CONTRACT, 4.

## CORRESPONDENCE—REVIEWS.

## CORRESPONDENCE.

TO THE EDITOR OF THE CANADA LAW JOURNAL.

GENTLEMEN—A point has arisen here in a County Court case upon which I should be glad to know your view.

Sect. 220 of the C. L. P. Act is to the effect that a party dissatisfied with the decision of the Judge at *Nisi Prius* respecting the allowance of any amendment may apply *to the Court*, from which the record issued, for a new trial, &c. Under this section can a party apply *in Chambers* to strike out a plea added at the trial by leave of the Judge, or should the motion be made in Term?

The plea in question was a plea of rescission and was pleaded to the whole declaration, the declaration containing a special count and counts for money paid and on accounts stated. I objected that a plea of rescission could not be pleaded to the common counts as under the latter the plaintiff must prove an executed contract, and an executed contract could not be rescinded. Of course a plea of release or accord and satisfaction could be pleaded, but, as I conceive, not a plea of rescission. The Judge ruled against me and allowed the plea to be pleaded to the whole declaration, and I moved in Term to strike out the plea, so far as pleaded, to the common counts, but was told that the application must be made in Chambers.

I have not been able to find any decision on the point; but looking at the different language of this section from the other sections of the Act, for instance, the section authorizing applications to strike out embarrassing pleadings to be made to a Judge in Chambers, I think the application to strike out a plea, added at the trial, should be made to the Court. The latter section, as I understand it, applies only to pleadings in the ordinary course of the action. The

two questions above mentioned appear to me of sufficient general interest to deserve an opinion from you. I do not ask you to discuss them for my assistance, as the case in which they arose is disposed of on other grounds.

Yours truly,

J. R.

## REVIEWS.

A MANUAL OF COSTS, WITH FORMS OF BILLS PREPARED FROM THE NEW TARIFFS. By J. S. Ewart, of Osgoode Hall, Barrister-at-law. Toronto: Rowsell & Hutchison, 1874.

It is rather late in the day to review this most useful little book, for we apprehend that long before this appears, every practitioner who has occasion to prepare a bill of costs, has supplied himself with a copy. It is, therefore, more to keep a record of our "native productions" than to give any information to our readers, that we now speak of Mr. Ewart's manual.

The compiler includes in his labours the tariffs of all the Courts and a variety of miscellaneous costs and fees, and their name is legion; in fact, were it not for the list in the table of contents, substantiated by reference to the pages of the book there indicated, one might well doubt there being such a number (no less than seventeen) in existence.

These miscellaneous tariffs comprise Part V. The first four parts are divided thus: Part I—Costs of proceedings in the Common Law Courts, alphabetically arranged; Part II—Forms of Bills in Common Law Courts; Part III—Costs of proceedings, alphabetically arranged, in Court of Chancery; Part IV—Forms of Chancery Bills.

A practical experience of some months is the best test of this book, and prophecy on our part is now out of place. That experience has shown that it is a reliable and compendious guide to practitioners, and it exhibits much care and industry on the part of the compiler.

Speaking of the new tariffs induces us to turn to a relic in the way of tariffs which a friend sent us the other day.

## FLOTSAM AND JETSAM.

It is a tariff of the Court of King's Bench, dated in Easter Term, 3rd, Geo. IV, and is signed by Wm. Campbell, J., and D. Boulton, J. It would seem to have been sent by post to "Arch'd McLean, Esq., Cornwall," and bears an endorsement which is apparently in the bold and clear handwriting of that fine old man. The judges of the present day who settled the last tariff will be glad to know that they have not gone to any undue length in their recent small increase, when reminded that at a time when money had a buying capacity of about four times greater than at present, the items in the tariff were much the same as at present, for example: Instructions, were £1.0.0; attendances, 2s. 6d. each, when special, 5s.; special affidavits, 5s. per folio, etc.

Sheriffs under the new traffs come out much better than lawyers—for example: Sheriffs now receive \$1.05 for a certificate of search for *fi. fa.* One would have thought that the former fee was ample for the work and responsibility, when it is remembered that a search is a thing of hourly occurrence in a Sheriff's office. But they, like Registrars, are blessed with a capacity of combining for their own interests with which lawyers are not gifted. The latter are not only deficient in this respect, but permit depredators and trespassers in the shape of unlicensed "land agents," and "conveyancers" (falsely so called) to take the bread out of their mouths. In England this is not so, and the time has come for a change in this country.

## FLOTSAM AND JETSAM.

**THEATRICAL JUSTICE.**—A new book relating to the earlier days of San Francisco recalls, in the following sensational style, an example of the oratory of the late "Harry Byrne," the California lawyer, whom Miss Matilda Heron, the actress, is said to have married many years ago: Mr. Byrne rose in the court-room amid deep silence, and proceeded to close for the prosecution. Pale as the white wall around him, with long and flowing black locks, his eye burning and glowing like a blazing coal, he tore the veil of sophistry, woven around the subject by his adversaries, and laid the bald and awful facts before the jury. Now rising to awful denunciation, he seemed a Nemesis to the cowering

criminal before him, now he turned his voice to low persuasion as he sought to mould the jury to his wishes. But as he paused, after a tremendous effort, his eye persuaded him that unless he called to his aid some new and startling line of action the verdict would be against him. At the time an old eccentric man was bailiff of the court. One of his peculiarities was to sleep through the arguments of counsel, and naught could arouse him save the command of the court, and the voice of the District-Attorney directing him to do some official act, but at these well-known sounds he would start from his seat with an alacrity remarkable for one of his years. Turning to the man (who was enjoying his usual nap) Byrne, to whom this idiosyncrasy was well known, pointed his finger at the peaceful countenance, and then eulogized his faithful attention to his duties. "But," said he, "he has in this case left one duty unperformed." Then, with a voice that thrilled through men's hearts and made the rafters ring; "Mr. Bailiff, call William Adams." The old man sprang from his seat, and hurrying across the court-room to the entrance beyond, called in a weird, thick manner, the dead man's name. "William Adams, William Adams, William Adams, come into court." The criminal shivered in his seat, men's blood flowed coldly, and the silence was as death. Justice seemed crying to heaven for retribution; the faces of jurors grew white and blue, and each man glued his eye upon the door as if he expected the apparition to answer the summons. "Gentlemen," continued Byrne, "that witness can never come. The one who can relate to you the circumstances of this tragedy lies in his cold and silent grave. No bailiff's voice can arouse him from his eternal sleep; naught save the clarion blast of the Archangel's trump can pierce the adamantine walls of his resting-place. He has been deafened forever by him who now stands arraigned at this bar. Base, brutal, bloody man; upon you hangs this awful responsibility. Your hands have dabbled in his blood, and as the instrument of outraged society, I demand your conviction." Genius triumphed. Justice was vindicated, and the prisoner expiated his offence on the scaffold.

## LAW SOCIETY—TRINITY TERM, 1874.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, TRINITY TERM, 38TH VICTORIA.

**D**URING this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

ANGUS M. MACDONALD.  
FREDERICK ST. JOHN.  
JOHN ROSS.  
DONALD GREENFIELD McDONELL.  
DAVID HILL WATT.  
JAMES PARKES.  
THOMAS B. BROWNING.  
JOHN RICE McLAURIN (admitted and called.)  
JOHN WRIGHT, under special Act " "

And the following gentlemen obtained Certificates of Fitness:

JOHN BRUCE.  
JAMES PARKES.  
DAVID HILL WATT.  
RICHARD DULMAGE.  
JOHN ROSS.  
GEORGE B. PHILIP.  
FREDERICK ST. JOHN.  
THOMAS B. BROWNING.  
GEORGE R. HOWARD.

And on Tuesday, the 25th of August, the following gentlemen were admitted into the Society as Students-at-Law:

*University Class.*

CHARLES WESLEY PETERSON.  
JOHN ENGLISH.  
GEORGE WILLIAM HEWITT.  
DUNCAN McTAVISH.  
DONALD MALCOLM MCINTYRE.  
THOMAS GIBBS BLACKSTOCK.  
WILLIAM E. HODGINS.  
FREDERICK PIMLOTT BETTS.  
ALFRED HENRY MARSH.

*Junior Class.*

ALEXANDER JACKSON.  
HENRY P. SHEPARD.  
HORACE COMFORT.  
BAYARD E. SPARHAM.  
ARCHIBALD A. McNABB.  
WILLIAM SWATIEH.  
ALBERT O. JEFFERY.  
WILLIAM F. MORPHY.  
HAMILTON INGERSOLL.  
ALBERT JOHN MCGREGOR.  
ROBERT D. STORY.  
DENIS J. DOWNNEY.  
ALFRED CARBS.  
ALEXANDER V. McCLENNAGHAN.  
CHARLES E. FREEMAN.  
JOHN HODGINS.  
FREDERICK MURPHY.  
GEORGE W. HATTON.  
MARTIN SCOTT FRASER.  
FREDERICK W. A. G. HAULTAIN.  
WILLIAM PATTISON.  
RODERICK A. MATHERSON.  
CHARLES E. S. RADCLIFF.  
*Articled Clerks.*  
PETER J. M. ANDERSON.  
JOHN H. SCOTTEALL.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects: namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams' Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 83, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding.—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON.  
Treasurer.

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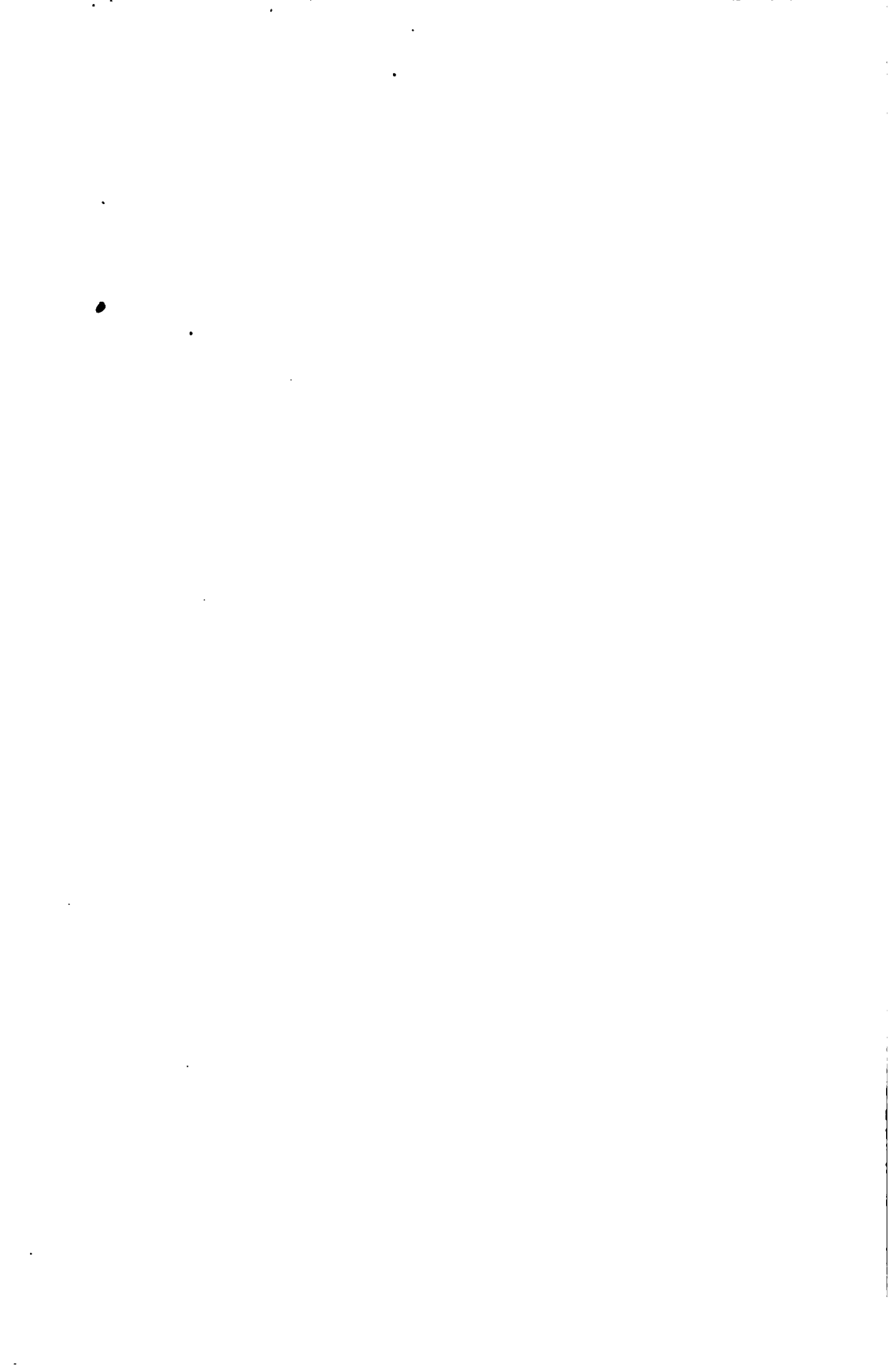
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